Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State may compel an organ of the Catholic Church, contrary to its religious teachings, to include contraceptives in the prescription drug plan it provides to its employees, and thereby to finance conduct that the Church teaches is sinful.

STATEMENT REQUIRED BY RULES 14.1 AND 29.6

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the Supreme Court of California were:

Catholic Charities of Sacramento, Inc., plaintiff;

Superior Court of Sacramento County, defendant;

State of California, California Department of Managed Health Care, and California Department of Insurance, real parties in interest.

Pursuant to Supreme Court Rule 29.6, petitioner states that Catholic Charities of Sacramento, Inc., is a single member corporation in which the sole member is the Roman Catholic Bishop of Sacramento, a corporation sole. Catholic Charities of Sacramento, Inc., is accordingly neither publicly held nor affiliated with any entity that is so held.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Catholic Charities of Sacramento, Inc., respectfully petitions for a writ of certiorari to review the decision and judgment entered on March 1, 2004, by the Supreme Court of California.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of California is reported at 85 P.3d 67 (Cal. 2004) and is reproduced in the Appendix ("App.") at 1a. The Supreme Court of California's grant of petition for review is reported at 31 P.3d 1271 (Cal. 2001) and is reproduced in the App. at 84a. The Court of Appeal of California's order modifying opinion and denying rehearing is unreported, is available at 2001 Cal. App. LEXIS 584, and is reproduced in the App. at 85a. The original opinion of the

Court of Appeal of California is reported at 109 Cal. Rptr. 2d 176 (Cal. App. 2001) and is reproduced in the App. at 87a. The opinions of the Superior Court of Sacramento County on the original motion and on reconsideration are unreported and are reproduced in the App. at 134a and 136a.

JURISDICTION

The judgment of the Supreme Court of California was entered on March 1, 2004. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant portions of the California Women's Contraception Equity Act ("WCEA"), Cal. Health & Safety Code § 1367.25 (2004) and Cal. Ins. Code § 10123.196 (2004), are reproduced in the App. at 139a.

STATEMENT OF THE CASE

The Supreme Court of California has upheld a state law that requires Catholic Charities of Sacramento, Inc. ("Catholic Charities"), an organ of the Catholic Church, to include contraceptives in the prescription drug plan that it provides to its employees—or to deprive its employees altogether of prescription drug coverage. This is, to our knowledge, the first case in which a court has upheld a law coercing a religious institution to spend its money to

finance non-governmental conduct that conflicts with its religious beliefs.[1]

The State of California does not justify this unprecedented intrusion upon the religious freedom of Catholic Charities by reference to any interest in making prescription drug coverage or contraceptive coverage generally available. Instead, it allows employers to deny prescription drug coverage altogether—and allows employers meeting the State's narrow definition of a "religious employer" to exclude contraceptive coverage from the prescription drug plans they choose to offer. The result, as explained below, is a statute that coerces some religious organizations, such as Catholic Charities, to sacrifice their religious principles based on nothing more than the State's restrictive view of what it means to be "religious."

A. Catholic Charities

Catholic Charities is a California public benefit non-profit corporation whose sole member is the Roman Catholic Bishop of Sacramento, itself a corporation sole. "[A]lthough separately incorporated and a distinct civil entity," Catholic Charities "is ecclesiastically part of the Catholic Church." 13 California Court of Appeal Documentary Appendix ("Cal. App.") A003743.

The purpose of Catholic Charities is to carry out the social justice ministry of the Catholic Church to care for the sick, the poor, the needy and the oppressed. 2 Cal. App. A000341. Catholic Charities' religious ministry includes a variety of social services that are offered to anyone in need, regardless of race, creed, sex, age or national origin.

Catholic Charities provides health insurance and prescription drug coverage to its approximately 180 employees

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[1] After this case was decided by the California Court of Appeal, a New York Supreme Court upheld a virtually identical statute. *Catholic Charities v. Serio*, No. 8229-02 (N.Y. Sup. Ct. Nov. 25, 2003). That case has been appealed.

through a group health plan underwritten by Blue Shield of California and Kaiser Permanente and held in the name of the Roman Catholic Bishop of Sacramento. 2 Cal. App. A000392-553. The plan has historically excluded coverage for prescription contraceptives.

B. Catholic Religious Beliefs

This case implicates three important religious and moral principles of the Catholic Church.

First, the Catholic Church teaches that artificial contraception is "intrinsically evil." 2 Cal. App. A000317. This is an historic and theologically grounded teaching of the Roman Catholic faith.[2]

Second, as the Bishop of Sacramento explained below, "Catholic Charities . . . , as part of the Catholic Church, cannot be complicit, directly or indirectly, in facilitating conduct or activities that violate Catholic religious teaching or belief." 13 Cal. App. A003744. Thus, Catholic Charities is prohibited from providing material financial support for the purchase and use of contraceptives. *Id.*

Third, "[t]he clear teaching and firm doctrine of the Roman Catholic Church is that all employers . . . are to provide just wages and benefits to employees . . . as an obligation arising from the Gospel message of justice and charity." 2 Cal. App. A000335. Consistent with that teaching, Catholic institutions such as Catholic Charities "have a moral and religious obligation to provide adequate health insurance benefits to their employees . . . includ[ing] providing employees access to prescription medications." 2 Cal. App. A000313-314. Any insurance plan providing such benefits, however, must itself conform to Catholic religious teaching. It cannot, therefore, offer coverage for artificial contraception or other

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[2] *See* John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (1965).

procedures, such as abortion, voluntary sterilization and *in vitro* fertilization. *Id.*

C. California Women's Contraception Equity Act

California's legislative effort to mandate prescription contraceptive coverage dates back to the 1993-1994 legislative session. The original statute enacted by the legislature did not include any exemption for religious institutions, which prompted then-Governor Pete Wilson to veto the bill. 7 Cal. App. A002006-08; 8 Cal. App. A002326-27. The legislature then enacted a bill with a broad exemption for religious employers, along with a public funding mechanism for uninsured women with incomes below a certain level. 9 Cal. App. A002390-96. Governor Wilson vetoed that bill, because he believed that its threshold income for public funding eligibility was too high. *Id.* A002640-42.

After Gray Davis became governor, bills were again introduced in both the Assembly and the Senate that omitted any exemption for religious employers. The sponsors asserted that the bills were intended to further gender equity and to facilitate the broadest possible access to prescription contraceptives for women. As before, the sponsors made clear that they "strongly object to a religious exemption." 3 Cal. App. A000781; 4 Cal. App. A000905. Granting an exemption for religious employers, they argued, would "defeat[] the original purpose of the bill." 11 Cal. App. A003050-51.

Eventually the legislature recognized the political and constitutional need for some kind of religious exemption. When the sponsors turned their attention to drafting an exemption, however, they fashioned it to cover only the narrowest range of institutions and to exclude numerous institutions that could legitimately claim a religious objection. As enacted, the exemption covers a "religious employer,"

which is defined as "an entity for which each of the following is true":

> (A) The inculcation of religious values is the purpose of the entity.
>
> (B) The entity primarily employs persons who share the religious tenets of the entity.
>
> (C) The entity serves primarily persons who share the religious tenets of the entity.
>
> (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1). The cited provisions of the Internal Revenue Code—which excuse certain entities not only from federal taxation, but also from federal tax filing—refer to (i) "churches, their integrated auxiliaries, and conventions or associations of churches;" and (iii) "the exclusively religious activities of any religious order."

Every one of these four prongs was "need[ed]," the authors explained, to ensure that the contraceptive mandate extended to Catholic religious institutions—including Catholic hospitals, colleges and universities, and "other possible situations." 11 Cal. App. A003063. It was "time," the chief sponsor of the Senate bill argued, to make those institutions responsive to the practices of Church members:

> [L]et me point out that 59 percent of all Catholic women of childbearing age practice contraception. 88 percent of Catholics believe in a *New York Times* poll that someone who practices artificial birth control can still be a good Catholic. I agree with that. I think it's time to do the right thing.

Id. A003080.

The California Legislature passed both the Assembly and Senate Bills on September 9, 1999. The two statutes, together comprising the WCEA, became effective January 1, 2000. Under their provisions, health insurance plans that cover prescription drugs must cover prescription contraceptives. A "religious employer" that believes it meets the four criteria above may request a policy that excludes coverage for "contraceptive methods that are contrary to the religious employer's religious tenets." Cal. Health and Safety Code § 1367.25(b); Cal. Ins. Code § 10123.196(d). Catholic Charities does not claim to meet any (let alone all) of those criteria.

D. Decisions Below

Catholic Charities filed suit in the Superior Court for Sacramento County on July 20, 2000, seeking declaratory and injunctive relief against application of the contraceptive mandate. Catholic Charities sought this relief under the Free Exercise and Establishment Clauses of the First Amendment, as well as Article I, § 4 of the California Constitution. On September 28, 2000, the Superior Court denied a motion for a preliminary injunction, ruling that Catholic Charities had shown no reasonable probability of success. On October 31, 2000, on reconsideration, the court reaffirmed that ruling. App. 134a.

Catholic Charities sought review by a writ of mandate to the California Court of Appeal, again asserting its First Amendment claims. The Court of Appeal issued an alternative writ and assumed jurisdiction. The Court denied the petition for a writ of mandate on July 2, 2001, holding that Catholic Charities was unlikely to prevail on the merits of its constitutional challenges. App. 87a. It denied a petition for rehearing on July 26, 2001. App. 85a.

The Supreme Court of California granted Catholic Charities' timely petition for review, which again asserted its

constitutional claims, on September 26, 2001. App. 84a. On March 1, 2004, the court affirmed the judgment in an opinion by Justice Werdegar, rejecting all of Catholic Charities' claims on the merits. App. 1a-49a. The Court rejected Catholic Charities' free exercise arguments based on its reading of this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In its view, the WCEA was a neutral law of general applicability that was justified, in any event, by the State's compelling interest in eliminating gender discrimination. App. 42a-46a.

Justice Kennard concurred but noted that she was "not persuaded" that the limitation of the exemption to entities whose purpose is the "inculcation of religious values" could be reconciled with the Establishment Clause. App. 51a. She concluded, however, that the requirement that the entity be exempt not only from federal taxes, but also from federal tax filing, "is constitutional." *Id.*

Justice Brown dissented. After distinguishing *Smith* on the ground that it involved the claim of an *individual*, not a *church*, App. 59a-61a, Justice Brown concluded that the act was not religiously neutral, App. 66a-72a, and sought impermissibly to "parse a bona fide religious organization into 'secular' and 'religious' components solely to impose burdens on the secular portion." App. 61a. The act's "religious employer" exemption reflected "such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity," Justice Brown observed, and "the Legislature's refusal to grant a broader exemption . . . is inexplicable." App. 74a, 79a. Justice Brown thus concluded that the act failed to pass strict scrutiny. App. 77a-79a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to clarify the meaning and scope of its ruling in *Employment Division v. Smith*, 494 U.S.

872 (1990), and to resolve important First Amendment questions of national importance. There are at least twenty-one states that have adopted laws mandating contraceptive coverage, only five of which contain comprehensive exemptions for religious employers.[3] The specific issues in this case, as well as the broader principles at stake, are therefore of interest to religious institutions across the country.

Over the years, the Court has struggled in a variety of settings to define the proper scope of the First Amendment's Free Exercise Clause. In *Smith*, the Court articulated a principle that the California Supreme Court thought was dispositive of the federal constitutional issue in this case—that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or

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[3] Five states provide no exemption for religious employers. *See* Ga. Code Ann. § 33-24-59.1 (1996); Iowa Code § 514C.19 (2001); N.H. Rev. Stat. Ann. §§ 415:18-1, 420-A:17-c, 420-B:8gg (2001); Vt. Stat. Ann. tit. 8 § 4099c (2000); Wash. Admin. Code § 284-43-822 (2002).

Ten states, including California, have exemptions that fail to cover all religiously affiliated employers. *See* Ariz. Rev. Stat. §§ 20-1057.08, 20-2329, 20-826 (2002); Haw. Rev. Stat. §§ 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (2000); Me. Rev. Stat. Ann. tit. 24-A, §§ 2756, 2847-G, 4247 (West 2000); Mass. Gen. Laws chs. 175, § 47W; 176A, § 8W; 176B, § 4W; 176 G, §4O (West 2002); Nev. Rev. Stat. §§ 689A.0415. 689A.0417. 689B.0376, 689B.0377, 695B.1916, 695B.1918, 695C.1964, 695C.1695 (West 2001); N.Y. Ins. Law §§ 3221 (16), 433(cc), 4322 (35) (McKinney 2000 & Supp. 2003); N.C. Gen. Stat. §§ 58-3-178, 58-50-125 (2000); R.I. Gen. Laws §§ 27-18-57, 27-19-48, 27-20-43, 27-41-59 (2000); Tex. Ins. Code Ann. Art. 21.52L (Vernon 2001).

Five states provide broader exemptions. *See* Conn. Gen. Stat. § 38a-503e, §38a-530e (2001); Del. Code Ann. Tit. 18, §3559 (1999); Md. Code Ann. Ins. § 15-826 (2001); Mo. Rev. Stat. § 376.1199 (Vernon 2002); N.M. Stat. Ann. §§ 59A-22-42, 59A-46-44, 59A-23-4 (Michie 2001). Illinois has no such exemption in its contraceptive coverage statute, 215 Ill. Comp. Stat. 5/356z.4 (2004), but it does have a comprehensive Health Care Right of Conscience Act. 745 Ill. Comp. Stat. 70 (2004).

prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). That principle, however, does not dispose of this case.

As explained below, this law's requirement of contraceptive coverage is not generally applicable. And it interferes in the most fundamental way with the freedom of a church to communicate its religious beliefs, the right of individuals to associate with others to promote a set of beliefs, and the right of a church to conduct its relations with its own employees in conformity with its beliefs—rights that this Court emphasized were not at issue in *Smith*. *See id.* at 877, 881.

By requiring some religious institutions, but not others, to include contraceptive coverage in their prescription drug plans, the State of California has assumed for itself the impermissible task of judging what is and is not religious exercise worthy of recognition—and simultaneously placed an unprecedented burden on those church institutions, like Catholic Charities, that are deemed insufficiently religious. There is, to our knowledge, no other context in which a court has upheld coerced financing by a church institution of non-governmental conduct that the church teaches is wrong. This Court should grant the writ to clarify that its prior decisions do not mandate this result, and to offer guidance on the principles that govern such a case.

I. THE COURT SHOULD CLARIFY THE SCOPE OF ITS DECISION IN *EMPLOYMENT DIVISION v. SMITH*.

Smith held generally that a "valid and neutral law of general applicability" may be enforced over the objection of religious dissenters. 494 U.S. at 879. To hold otherwise, the Court reasoned, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879 (quotation omitted). This case involves different principles.

A. The California Statute Is Not a "Law of General Applicability."

When the state enacts a law prohibiting "socially harmful conduct," *Smith*, 494 U.S. at 885—for example, a law against polygamy—the state has an obvious interest in the uniform application of that law. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878). And when the state enacts a law requiring conduct deemed important to the community—such as the payment of taxes—the state has an equally obvious interest in the uniform application of that law. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982). In *Smith*, this Court held that the interest in uniform application of such laws—"neutral laws of general applicability"—is such that the government is not required, in the ordinary course, to grant exemptions to individuals who articulate a religious objection.

This case calls upon the Court to offer guidance in a different kind of case. Here, the State of California has identified no conduct so harmful that no employer should be permitted to engage in it, and no benefit so important that all employers should be required to provide it. California asserts no interest in mandating the uniform provision of prescription drug coverage or the uniform provision of contraceptive coverage. It has not enacted any "generally applicable" requirement of prescription or contraceptive coverage. To the contrary, it permits employers to deny prescription drug coverage altogether, and it permits some religious employers to exclude contraceptives from prescription plans that they choose to offer. Indeed, if anything, the statute at issue here undermines any interest the State might assert in encouraging uniform provision of prescription drug coverage—by discouraging those who object to providing *contraceptive* coverage from providing *any* prescription drug coverage at all.

In short, California asserts no interest in uniform provision of the benefit with which the law is concerned. Under this

circumstance, there is a threshold question, appropriately addressed by this Court, whether the basic principle of *Smith* has any applicability at all.

B. The California Statute Interferes with "Hybrid" Rights

In *Smith*, the Court noted that even neutral, generally applicable laws are vulnerable to attack based on the Free Exercise Clause "in conjunction with other constitutional protections." 494 U.S. at 881. Among those "other constitutional protections," the Court noted, were "freedom of speech" and "freedom of association." *Id.* at 881-82. This case involves both of those rights. It interferes with the freedom of a religious organization to communicate its religious beliefs and the right of individuals to associate with others to promote a set of beliefs. It therefore presents precisely the "hybrid situation" that warrants stricter scrutiny under *Smith*. *Id.* at 882.[4]

In *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), this Court held that the Boy Scouts' "freedom of expressive association" prevented the state from enforcing its public accommodations law to require the inclusion of a gay

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[4] The California Supreme Court, while rejecting the "hybrid" claim here on the merits, noted that this Court has not, since *Smith*, "determined whether the hybrid rights theory is valid," App. 32a, and that the lower courts have differed as to its application. *Compare Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) *and Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (requiring an independently valid constitutional claim) *with Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (requiring a likelihood of success on the merits) *with Swanson v. Guthrie Ind. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998) (requiring a "colorable claim") *with Leebaert v. Harrington*, 332 F.3d 134, 143-144 (2d Cir. 2003) *and Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993) (rejecting hybrid theory altogether as non-binding *dicta*). This split of authority is another reason to grant the petition.

assistant scoutmaster. Forcing the Boy Scouts to retain a gay assistant scoutmaster, the Court explained, would "significantly burden the organization's right to oppose or disfavor homosexual conduct." *Id.* at 659. Likewise, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held unanimously that the organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was thought to communicate a message about homosexual conduct that the organizers "did not like." *Id.* at 574. The parade organizers had that right even though they had no particular message on the subject that they wished to convey—only a preference "not to propound a particular point of view." *Id.* at 575.

Catholic Charities and its supporters have an even stronger right than parade organizers and the Boy Scouts to join together in an organization that stands for something. They have the additional protection of the Free Exercise Clause. And if non-religious organizations have a constitutional right to exclude individuals whose mere presence might send a message on the subject of homosexuality that they do not like, then how much more clear it must be that a *church* organization has a right not to *subsidize* conduct that *contradicts its teachings*.

There is no question that financial support is a form of sponsorship or endorsement.[5] When an organization pays for

[5] Our argument is limited to the coerced subsidization of *non-governmental* conduct. A citizen may be compelled to pay taxes to support the general activities of government, even when he objects to particular activities on religious grounds. *See, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982). That is principally because "[t]he tax system could not function" if individuals and organizations could pick and choose the policies that they could in conscience support. *Id.* at 260. But it also reflects the reality that compliance with such a fundamental duty of citizenship can hardly be understood as an expression of support for all of the government's policies.

an activity, the message that is ordinarily communicated is that the organization endorses or approves of the activity. When a religious institution subsidizes particular conduct, the inescapable message is that it does not disapprove of that conduct. A religious institution cannot communicate an effective message that conduct is sinful at the same time that it pays for that conduct to occur. Catholic Charities cannot persuasively communicate the Church's teaching that contraceptive use is immoral, if it pays for contraceptives for its employees. At least Catholic Charities is entitled to reach that judgment. As the Court emphasized in the *Boy Scouts* case, "we must . . . give deference to an association's view of what would impair its expression." 530 U.S. at 653.

In other settings, this Court has recognized that private citizens' expenditures of money can themselves be a form of speech, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 19 (1976), and that an individual cannot be required to subsidize activities that he opposes. In *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977), the Court held that it violated the First Amendment rights of state employees to require them to provide financial support for ideological union activities unrelated to collective bargaining.[6] And in *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990), the Court held that state bar members could not be compelled to finance political and ideological activities with which they disagreed. In both cases, the court recognized that compelled subsidization

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[6] Although the Court reaffirmed its previous rulings that the state had an overriding interest that justified compelling employees to subsidize the collective bargaining activities of the union, it recognized that even that form of compelled subsidization might interfere with an employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. In an observation that is pertinent to this case, the Court noted that an employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan." *Id.*

amounted to a compelled message of approval or support in violation of the First Amendment.

The connection between subsidization and endorsement has been recognized in other contexts as well. It is because of that connection that direct government funding of religious activity gives rise to Establishment Clause concerns. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring). Indeed, the Court has emphasized that the government chooses to fund certain activities and not others precisely to "*encourage*[] . . . activity deemed in the public interest." *Harris v. McRae,* 448 U.S. 297, 315 (1980) (emphasis added). In *Harris* and *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld legislative decisions to encourage "childbirth over abortion by means of subsidization of one and not the other." *Harris*, 448 U.S. at 315. So too here, Catholic Charities sends a message of discouraging--indeed, morally condemning—contraception when it withholds funding for contraceptives.[7]

It is ultimately up to the speaker to choose its message, and "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. Catholic Charities has a right to choose its moral message—and to have that message uncompromised by a requirement that it subsidize the very conduct that it condemns. California's law interferes directly with the ability of Catholic Charities to communicate its chosen religious message and to make clear what the Catholic Church does and does not condone.

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[7] Like *Harris* and *Maher*, the Court's recent decision in *Locke v. Davey,* 124 S. Ct. 1307 (2004), recognizes that the government has discretion to decide what activities to finance, even when its decisions adversely affect the exercise of a fundamental constitutional right. Even more obviously, religious organizations *whose constitutional rights are at stake* must retain some discretion not to spend their money to support non-governmental conduct that offends their religious beliefs.

The California Supreme Court noted that Catholic Charities "may . . . avoid the conflict with its religious beliefs simply by not offering coverage for prescription drugs." App. 40a-41a. But that observation slights the Church's teachings. The uncontradicted evidence is that Catholic Charities operates under an "obligation," arising from "[t]he clear teaching and firm doctrine of the Roman Catholic Church" and "the Gospel message of justice and charity," App. 41a, to provide prescription drug coverage to its employees. *See* 2 Cal. App. A000313-14. The California court questioned whether that reflected a mere "philosophical" choice rather than a "religious belief." App. 41a-42a. But no one can seriously doubt that a "firm doctrine . . . arising from the Gospel message" is religious in nature, and no court may second-guess a church entity's construction of that Gospel message. *See, e.g., United States v. Lee*, 455 U.S. at 257 ("It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; '[c]ourts are not arbiters of scriptural interpretation.'") (alteration in original) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981)).

There is simply no question, as the California court ultimately assumed, that this law "substantially burdens a religious belief." App. 42a. Indeed, that is an understatement. The law forces a choice between violating two religious teachings—and, in either case, compromising an important religious message.

In *Smith*, the Court emphasized that the free exercise claim was "unconnected with any communicative activity" and unrelated to "the communication of religious beliefs." 494 U.S. at 882. By contrast, the compelled subsidization in this case strikes at the heart of the Catholic Church's ability to communicate its unambiguous commitment to basic moral

teachings and to form associations, like Catholic Charities, that maintain their adherence to those moral teachings.

It is no accident that until now no state has seen fit to coerce a religious institution to subsidize non-governmental conduct that it regards as sinful. One can scarcely think of a more direct and substantial interference with the religious mission of a church. If the State of California can coerce Catholic agencies to pay for contraceptives, it can force them to pay for abortions. *Smith* does not begin to answer the question whether the state may take such action.

C. The California Statute Interferes with the Institutional Autonomy of the Church.

Smith involved only "individual" rights. 494 U.S. at 876, 878-79. This case involves critical issues of institutional autonomy—specifically, a church's relationship with those whom it employs to carry out its mission. In *Smith*, 494 U.S. at 877, the Court noted the continuing validity of the cases that bear upon those issues—*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Those cases recognize that the protection of the First Amendment extends not only to matters of faith, but also to "church administration," *Serbian Eastern Orthodox Diocese*, 426 U.S. at 710, and "the operation of . . . churches," *Kedroff*, 344 U.S. at 107.

Applying these cases, courts have held uniformly that the First Amendment protects the right of a church to make decisions about the employment of those who carry out the church's religious mission.[8] Congress, of course, recognized

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[8] *See, e.g., Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698 (7th Cir. 2003) (hispanic communications manager); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (folk choir director);

that important principle when it adopted an exception from Title VII to permit religious groups and schools to restrict hiring to members of their faith. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (upholding exemption against Establishment Clause challenge). The cases cited above have held that Congress's exemption did not go far enough—that the First Amendment protects the right not only to restrict hiring to members of the church, but more generally to decide who is fit to carry out the church's religious mission.

Just as a church entity has a First Amendment right to decide who is fit to carry out its religious mission, so too must it have the right to structure its relationship with its employees in conformity with church teachings.[9] If it chose to, a church entity could require its employees to promise to conform their conduct to church teachings. Surely it can take the more "hands-off" approach of not funding conduct by its employees that would violate those teachings. That is all that Catholic Charities has done here.

Catholic Charities' employees have chosen to associate themselves with the social justice ministry of the Catholic Church, and Catholic Charities has hired them to advance that ministry. There may be limits upon a church entity's right to

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Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (minister); *Combs v. Cent. Tex. Annual Conf. of United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (minister); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (associate professor of canon law); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002) (church autonomy doctrine bars youth minister's claim of sexual harassment based on statements regarding homosexuality).

[9] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1408-09 (1981).

conform its employee relations to church teachings. *See, e.g., United States v. Lee*, 455 U.S. 252. But neither *Smith* nor any other decision of this Court suggests that a church institution may be compelled to finance private employee conduct that violates church teachings.

II. THE COURT SHOULD CLARIFY THE LIMITS ON THE STATE'S POWER TO FORCE A CHURCH INSTITUTION TO SUBSIDIZE CONDUCT THAT IT BELIEVES IS SINFUL.

There is no case in which this Court has upheld a law that coerces a church institution to subsidize non-governmental conduct that is contrary to the church's moral code. Indeed, to our knowledge, until contraceptive mandate statutes were adopted in California and elsewhere, there had not been any legislative effort to coerce a church institution to subsidize such conduct. There is a national interest in clarifying the constitutional standards that apply to these recent legislative efforts—specifically, whether and, if so, how the Court's "compelling state interest" test applies.

A. Does the Compelling State Interest Test Apply?

In the *Boy Scouts* case, the Court held that not even a compelling state interest is enough to prevail when, as in this case, government action would "materially interfere with the ideas that the organization sought to express." 530 U.S. at 657. "[I]n the associational freedom cases," the Court explained, "*after finding a compelling state interest*, the Court went on to examine whether or not the application of the state law would impose any 'serious burden' on the organization's rights of expressive association." *Id.* at 658 (emphasis added). In *Boy Scouts*, as in *Hurley* (and this case), the state asserted a compelling interest in eliminating discrimination. The Court concluded, however, that appli-

cation of the state's anti-discrimination law "would significantly burden the organization's right to oppose or disfavor homosexual conduct," and that "[t]he state interests embodied in [that] law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659. The same reasoning applies here.

A similar approach has been taken in the church autonomy cases. This Court has rejected government interference in matters of church administration without considering whether a compelling government interest might be served. *See, e.g., Serbian Eastern Orthodox Diocese*, 426 U.S. 696; *Kedroff*, 344 U.S. 94. And the courts of appeals have held that anti-discrimination laws may not be applied to the claims of ministerial employees, regardless of any compelling interest that might be asserted. *See* note 8, *supra*. A similar approach is warranted when, as in this case, the state seeks to rearrange the relationship between a church institution and its employees in contravention of church teachings.

The Court has applied a compelling interest analysis, however, in cases involving content regulation of religious and other speech. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (no compelling interest to justify denial of use of public space for private religious speech); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (no compelling interest to warrant prohibition of religious speech on school property); *Wooley v. Maynard*, 430 U.S. 705 (1977) (no compelling interest to warrant compelled display of license plate slogan that offended religious beliefs); *see generally United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."). It is at least arguable that these cases supply the applicable standard here.

There is, we respectfully submit, need for guidance from this Court on whether laws like California's *need not* be justified by a compelling government interest (the *Smith* standard), *may* be justified by a compelling government interest (the content-based speech standard), or *may not* be justified even by a compelling government interest (the expressive association and church autonomy approach).

B. Is There a Compelling State Interest?

There is need for guidance as well on *how* the compelling interest standard is to be applied if it is, indeed, the applicable standard. Although the California Supreme Court held that California need not show a compelling interest to satisfy the federal constitution, it nevertheless concluded that the State had met that standard. App. 42a-46a. That conclusion is itself worthy of review.

The interest asserted here is the State's interest in promoting gender equity. *Even the State, however, does not assert that that interest trumps religious freedom.* Its lawyers may now find it necessary to argue that the interest in gender equity amounts to a compelling state interest, but *it is dispositive that the state legislature decided otherwise*—by deciding not to force compliance by "religious employers." How can the State assert that its interest in promoting gender equity outweighs the First Amendment rights of religious organizations, when its legislature has decided that the First Amendment rights of "religious employers" outweigh its interest in promoting gender equity? Or, to put the question another way, how can the State maintain that it has a compelling interest in applying the contraceptive mandate to some religious organizations and not others? The reality is that respecting Catholic Charities' First Amendment rights would do little to compromise the State's interest in eliminating alleged gender inequities beyond the point to which that interest has already been compromised by the State's own statutory exemption.

The asserted interest here is not compelling in any event. California is not seeking to eliminate a form of overt or invidious discrimination. Indeed, Catholic Charities does not engage in any discrimination at all. The Church maintains a religious belief that applies equally to men and women and that does nothing to foster any segregation between them. It prohibits contraceptive use by men and women alike. Catholic Charities, therefore, has traditionally denied coverage for contraceptive methods used by men (*e.g.*, vasectomies) and women (*e.g.*, birth control pills).

The Catholic Church's teaching conflicts with California's view of gender equity only because California has chosen to focus on *prescription* contraceptives alone—and because, at least for now, only women use prescription contraceptives. California's notion of gender equity, however, is by no means self-evident. *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (exclusion of pregnancy-related disabilities from disability plan is not gender discrimination).[10] Men and women share an interest in contraception. For every woman who seeks contraception, there is presumably a man. And men use contraceptives (condoms) for which no insurance is available.

Notwithstanding these facts, California is certainly entitled to decide that extending employer prescription drug coverage to include contraceptives is a matter of gender equity. The question is whether the State has a compelling interest in promoting this notion of gender equity. More precisely, *the question is whether the State's interest in enforcing its notion of gender equity is more important than its obligation to respect the religious beliefs of the Church and the right of the*

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[10] The result in *Gilbert* was overruled by the Pregnancy Discrimination Act, an amendment to Title VII, Pub. L. No. 95-555, 92 Stat. 2076 (1979) (codified as 42 U.S.C. § 2000e(k)), but that only underscores that there is more than one view of gender equity in such situations.

Church's institutions to maintain their doctrinal integrity. That is a question that is itself worthy of this Court's attention.

In the final analysis, this case is less a conflict between religious freedom and the public welfare than it is, as Justice Brown's dissent observed, "a clash of ideas"—the State's view of gender equity versus the Church's view of moral truth. App. 70a n.4. Significantly, it is a clash that takes place not in the community at large, but within a Church institution—in the context of Catholic Charities' relationship with those who have joined in a religious mission undertaken in the name of the Catholic Church. In such a clash of ideas, the First Amendment dictates that the State recede, for that is the only way in which both the State and the Church can continue to promote their messages. As the State has already conceded, its commitment to gender equity can be expressed and advanced without requiring Church institutions to go along. But the Church's message, once altered by the State, is forever diminished.[11]

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[11] Professor Laurence Tribe made the same point in commenting upon the Court's *Boy Scouts* decision, noting that the case involved "a direct clash of competing images of 'the good life,'" and observing that "in such a clash, the teaching of the First Amendment has long been that the state loses." Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 651-52 (2001). Professor Tribe elaborated:

> When the state's position on the matter can prevail only by significantly undercutting a particular individual's or group's ability to carry out its expressive or otherwise constitutionally protected mission, one cannot automatically assume that the state's condemnation of the contested practice as "discrimination" furnishes a compelling justification sufficient to negate the liberty of the individual or group. For that *"discrimination" is but a pejorative label for the very thing the individual or group must do in order to express its contrary philosophy and transmit that philosophy to the next generation.*

Id. at 652 (emphasis added).

III. THE COURT SHOULD CLARIFY THE LIMITS ON THE STATE'S POWER TO JUDGE WHETHER A CHURCH ENTITY IS SUFFICIENTLY RELIGIOUS TO EXERCISE ITS RELIGION FREELY.

The State of California recognized that a blanket requirement of contraceptive coverage would intrude upon the religious freedom of churches that proscribe the use of contraceptives. It made a judgment that "religious employers" need not subsidize coverage that conflicts with their religious beliefs. But the State then so limited its definition of "religious employers" as to exclude organizations such as Catholic Charities, which is part of the Catholic Church and which carries out an essential part of the Church's religious mission. In the judgment of the State of California, a "religious employer" is entitled to an exemption from its law, but Catholic Charities is simply not religious *enough* to exercise its religion freely.

The State, however, lacks the power to judge what Church institutions are "*sufficiently* religious" to be allowed to exercise their religious beliefs. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343-44 (D.C. Cir. 2002) (emphasis in original). To ask that question "is to tread upon that which the First Amendment protects." *Id.* at 1344. *See also NLRB v. Catholic Bishop*, 440 U.S. 490, 493 (1979) (noting constitutional problems arising from the NLRB's decision to exempt religiously sponsored organizations from its jurisdiction "only when they are *completely religious*, not just religiously associated") (emphasis added).

To be sure, there is a threshold requirement that must be satisfied before any individual or institution can claim the protection of the Free Exercise Clause. But the question is simply whether the asserted belief is religious in nature and "sincerely held," *United States v. Seeger*, 380 U.S. 163, 185 (1965)—and, in the case of an organization, whether it is a

bona fide religious organization. *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982); *Great Falls*, 278 F.3d at 1344.[12]

The State of California has erected a statutory test that distinguishes among Church institutions—insisting in effect that a church organize and conduct itself in a manner that conforms to the State's model of a church. In California's judgment, an employer is not entitled to assert its religious objections to paying for contraceptives unless, among other things, the "purpose of the entity" is the "inculcation of religious values," and the entity "primarily" employs and serves persons who "share [its] religious tenets." In addition, the employer must be one of the two sub-categories of "religious organizations" that the Internal Revenue Code exempts not only from taxes, but also from filing annual returns.

Catholic Charities' stated purpose is not to "inculcat[e]" religious values,[13] but to carry out the Church's religious mission to perform corporal works of mercy. It provides social services to anyone in need, whatever his or her religious beliefs. And it employs those who, regardless of their own religion, embrace Catholic Charities' mission and under-

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[12] Drawing upon then-Judge Breyer's opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 400 (1st Cir. 1985) (en banc), the D.C. Circuit in *Great Falls* embraced a simple test for determining whether a school was exempt from NLRB jurisdiction—whether it "holds itself out" as "providing a religious educational environment," whether it is "organized" as a 'nonprofit,'" and whether it is "affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization." 278 F.3d at 1343. That test, of course, was designed for educational institutions. Adjusted only slightly to cover non-educational institutions, it is easily met by Catholic Charities.

[13] The Oxford English Dictionary (2d ed. 1989) defines "inculcate" to mean "endeavour to force (a thing) into or impress (it) on the mind of another by emphatic admonition, or by persistent repetition; to urge on the mind, esp. as a principle, an opinion, or a matter of belief; to teach forcibly."

stand that it is pursued in conformity with the faith and teachings of the Church of which it is a part. In the judgment of the State, Catholic Charities' religious rights are forfeited for these reasons—because, to put it bluntly, it puts its religion into practice and does so in an all-inclusive way. There is, California seems to say, something *less* religious about such an organization. A *truly* religious organization, in its view, would be more exclusive in its associations, more single-minded in its purpose, and less concerned about the welfare of others. It would be concerned only with drilling, or "inculcating," its beliefs into the minds of its adherents.

There is no precedent for such a narrow view of religion. The First Amendment protects the right freely to "exercise" one's religion, and there is no question that Catholic Charities exercises its religion when it serves the needy in the name of the Church. That is indisputably part of the "mission" of the Church. 2 Cal. App. A000341. Catholic Charities' "purpose" need not be the inculcation of religious values to invoke the protection of the Free Exercise Clause. *See, e.g., Great Falls,* 278 F.3d at 1346 (First Amendment protection not limited to "religious institutions with hard-nosed proselytizing"). Nor does its "purpose" need to be expressive to invoke its rights to free speech and association. In *Boy Scouts of America v. Dale*, this Court recognized that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment." 530 U.S. at 655. It is enough that an association "merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* There is no question that Catholic Charities engages in expressive activity—from calling itself "Catholic" to communicating its religious values through its charitable work—and that the law at issue compels it to engage in expressive activity at odds with the message that it wishes to communicate.

Nor is there any basis for the proposition that a religious organization must discriminate against non-adherents to claim the protection of the First Amendment. That it employs others to assist in its religious mission and extends its mission to the service of others makes it no less a *bona fide* religious organization. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982) (religious organization that solicited more than fifty percent of its funds from nonmembers has First Amendment rights); *Great Falls*, 278 F.3d at 1346 (First Amendment protection not limited to "religious institutions . . . that limit their enrollment to members of their religion").

California's attempt to define religion in this way finds no support in any of this Court's pronouncements about religious freedom. Its test unquestionably excludes organizations, like Catholic Charities, that are clearly entitled to the protection of the Free Exercise Clause.

But that is not all. California's test invites intrusive and subtly coercive scrutiny that is itself offensive to the First Amendment. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that the state may not condition the solicitation of aid for religious purposes upon a license, "the grant of which rests in the exercise of a determination by state authority as to what is a religious cause." *Id.* at 307. Applying that principle in *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982), the court of appeals invalidated a city licensing scheme that exempted solicitations for a church's "evangelical, missionary or religious" purposes, 634 F.2d at 479, but not for a church's charitable activities, such as the provision of food, clothing and shelter. Making such distinctions was "necessarily a suspect effort," the court observed, and "the continuing

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necessity for making judgments as to what is or is not religious" rendered the scheme unconstitutional. *Id.* at 481.[14]

Likewise, in *Great Falls* the court held that any inquiry into whether an employer is "*sufficiently*" religious "intrude[s] upon the free exercise of religion" by subjecting religious organizations to unwarranted scrutiny and interference. 278 F.3d at 1344 (emphasis in original). How "important [is] the religious mission . . . to the institution"? *Id.* Precisely how much attention does the organization pay to religious teaching, as opposed to social welfare work? How do the group's overall activities promote the "inculcation of religious values"? What is the religious affiliation of those who are served?

Such questions serve no legitimate purpose in this context. And their effect is undeniably to coerce religious organizations to tailor their methods and restrict their activities to satisfy the State—in this case, to begin proselytizing and to stop hiring and serving non-Catholics.

California and other states have embarked on a dangerous course in attempting to identify some religious institutions that are free to practice what they preach and others to whom that freedom is denied. Guidance is needed to make clear that all religious institutions are entitled to the protection of the First Amendment.

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[14] *See also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. at 343 (Brennan, J., concurring in the judgment) ("[D]etermining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.") (citation omitted).

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed 3/1/04

IN THE SUPREME COURT OF CALIFORNIA

CATHOLIC CHARITIES OF SACRAMENTO, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent;

DEPARTMENT OF MANAGED HEALTH CARE et al.,

Real Parties in Interest.

S099822

Ct. App. 3 C037025

Sacramento County Super. Ct. No. 00AS03942

In this case, we address a church-affiliated employer's constitutional challenges to the Women's Contraception Equity Act (WCEA),[1] under which certain health and

[1] The WCEA comprises two laws, Health and Safety Code section 1367.25 (Stats. 1999, ch. 532) and Insurance Code section 10123.196 (Stats. 1999, ch. 538).

disability insurance contracts must cover prescription contraceptives. The plaintiff employer, which opposes contraceptives on religious grounds, claims the statute violates the establishment and free exercise clauses of the United States and California Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The lower courts rejected the employer's claims. We affirm.

I. Facts

The Legislature enacted the WCEA in 1999 to eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives. Evidence before the Legislature showed that women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in large part to the cost of prescription contraceptives and the various costs of unintended pregnancies, including health risks, premature deliveries and increased neonatal care. Evidence also showed that, while most health maintenance organizations (HMO's) covered prescription contraceptives, not all preferred provider organization (PPO) and indemnity plans did. As a result, approximately 10 percent of commercially insured Californians did not have coverage for prescription contraceptives.

The Legislature chose to address these problems by regulating the terms of insurance contracts. The WCEA does not require any employer to offer coverage for prescription drugs. Under the WCEA, however, certain health and disability insurance plans that cover prescription drugs must cover prescription contraceptives. As an exception, the law permits a "religious employer" to request a policy that includes drug coverage but excludes coverage for "contraceptive methods that are contrary to the religious

employer's religious tenets."[2] Health and Safety Code section 1367.25 governs group health care service plan contracts;[3] Insurance Code section 10123.196 governs individual and group disability insurance policies.[4]

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[2] Health and Safety Code section 1367.25, subdivision (b); Insurance Code section 10123.196, subdivision. (d).

[3] Health and Safety Code section 1367.25 provides:

"(a) Every group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2000, and every individual health care service plan contract that is amended, renewed, or delivered on or after January 1, 2000, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits:

"(1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration approved prescription contraceptive methods designated by the plan. In the event the patient's participating provider, acting within his or her scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient's medical or personal history, the plan shall also provide coverage for another federal Food and Drug Administration approved, medically appropriate prescription contraceptive method prescribed by the patient's provider.

"(2) Outpatient prescription benefits for an enrollee shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

"(b) Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for federal Food and Drug Administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for contraceptive methods.

"(1) For purposes of this section, a 'religious employer' is an entity for which each of the following is true:

"(A) The inculcation of religious values is the purpose of the entity.

"(B) The entity primarily employs persons who share the religious tenets of the entity.

"(C) The entity serves primarily persons who share the religious tenets of the entity.

"(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

"(2) Every religious employer that invokes the exemption provided under this section shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.

"(c) Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an enrollee.

"(d) Nothing in this section shall be construed to deny or restrict in any way the [D]epartment[of Managed Care's] authority to ensure plan compliance with this chapter when a plan provides coverage for prescription drugs.

"(e) Nothing in this section shall be construed to require an individual or group health care services plan to cover experimental or investigational treatments."

[4] Insurance Code section 10123.196 is essentially the same as Health and Safety Code section 1367.26 (see fn. 3, *ante*), except that it regulates disability insurance policies instead of health care service plan contracts. For the sake of convenience, subsequent references to the WCEA will include only the Health and Safety Code.

Plaintiff Catholic Charities of Sacramento, Inc. (hereafter Catholic Charities) is a California nonprofit public benefit corporation. (See Corp. Code, § 5110 et seq.) Although independently incorporated, Catholic Charities describes itself as "operated in connection with the Roman Catholic Bishop of Sacramento" and as "an organ of the Roman Catholic Church." The nonprofit corporation "offer[s] a multitude of social services and private welfare programs to the general public, as part of the social justice ministry of the Roman Catholic Church." These services and programs include "providing immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, housing and vocational training of the developmentally disabled and the like."

Catholic Charities offers health insurance, including prescription drug coverage, to its 183 full-time employees through group health care plans underwritten by Blue Shield of California and Kaiser Permanente. Catholic Charities does not, however, offer insurance for prescription contraceptives because it considers itself obliged to follow the Roman Catholic Church's religious teachings, because the Church considers contraception a sin, and because Catholic Charities believes it cannot offer insurance for prescription contraceptives without improperly facilitating that sin.

As mentioned, the WCEA permits a "religious employer" to offer prescription drug insurance without coverage for contraceptives that violate the employer's religious tenets. (Health & Saf. Code, § 1367.25, subd. (b).) The act defines a "religious employer" as "an entity for which each of the following is true: [¶] (A) The inculcation of religious values is the purpose of the entity. [¶] (B) The entity primarily employs persons who share the religious tenets of the entity. [¶] (C) The entity serves primarily persons who share the religious tenets of the entity. [¶] (D)

The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended." (*Ibid.*) The cited provisions of the Internal Revenue Code exempt, from the obligation to file an annual return, "churches, their integrated auxiliaries, and conventions or associations of churches" (26 U.S.C. § 6033(a)(2)(A)(i)) and "the exclusively religious activities of any religious order" (*id.*, § 6033(a)(2)(A)(i) and (iii)).

Catholic Charities does not qualify as a "religious employer" under the WCEA because it does not meet any of the definition's four criteria. (See Health & Saf. Code, § 1367.25, subd. (b)(1)(A)-(D).) The organization candidly acknowledges this in its complaint, offering the following explanation: "The corporate purpose of Catholic Charities is not the direct inculcation of religious values. Rather, [its] purpose . . . is to offer social services to the general public that promote a just, compassionate society that supports the dignity of individuals and families, to reduce the causes and results of poverty, and to build healthy communities through social service programs such as counseling, mental health and immigration services, low-income housing, and supportive social services to the poor and vulnerable. Further, Catholic Charities does not primarily employ persons who share its Roman Catholic religious beliefs, but, rather, employs a diverse group of persons of many religious backgrounds, all of whom share [its] Gospel-based commitment to promote a just, compassionate society that supports the dignity of individuals and families. Moreover, Catholic Charities serves people of all faith backgrounds, a significant majority of [whom] do not share [its] Roman Catholic faith. Finally, . . . Catholic Charities, although an exempt organization under 26 U.S.C. § 501(c)(3), is not a nonprofit organization pursuant to [s]ection 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986. Consequently, . . . Catholic Charities is not entitled . . . to an exemption from the mandate imposed by [the WCEA]."

As mentioned, the WCEA implicitly permits any employer to avoid covering contraceptives by not offering coverage for prescription drugs. But this option, according to Catholic Charities, does not eliminate all conflict between the law and its religious beliefs. Catholic Charities feels obliged to offer prescription drug insurance to its employees under what it describes as the "Roman Catholic religious teaching" that "an employer has a moral obligation at all times to consider the well-being of its employees and to offer just wages and benefits in order to provide a dignified livelihood for the employee and his or her family."

Perceiving no option consistent with both its beliefs and the law, Catholic Charities filed this action seeking a declaratory judgment that the WCEA is unconstitutional and an injunction barring the law's enforcement. Defendants are the State of California, the Department of Managed Health Care and the Department of Insurance.[5] Catholic Charities' challenges to the WCEA arise under the establishment and free exercise clauses of the United States and California Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) The superior court, finding no reasonable likelihood that Catholic Charities would prevail on the merits, denied its motion for a preliminary injunction. Catholic Charities sought review of this ruling by petition for writ of mandate, which the Court of Appeal denied. We granted review of the Court of Appeal's decision.

II. Discussion

Catholic Charities, in its brief to this court, asserts eight constitutional challenges to the WCEA. All refer to the

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[5] The Department of Managed Health Care regulates health care service plans. (Health & Saf. Code, § 1341 et seq.) The Department of Insurance and the Insurance Commissioner regulate disability insurance policies. (See *id.*, § 1343, subd. (e)(1), and Ins. Code, § 10290 et seq.)

religion clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4.) Catholic Charities begins with a set of three arguments to the effect that the WCEA impermissibly interferes with the autonomy of religious organizations. (See p. 7 et seq., *post.*) Next, Catholic Charities claims the WCEA impermissibly burdens its right of free exercise. As part of this claim, Catholic Charities offers four arguments for subjecting the WCEA to strict scrutiny, despite the United States Supreme Court's holding that the right of free exercise does not excuse compliance with neutral, generally applicable laws. (*Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 876-890; see p. 16 et seq., *post.*) Finally, Catholic Charities contends the WCEA fails even the rational basis test. (See p. 44 et seq., *post.*)

A. Religious Autonomy

1. Interference with matters of religious doctrine and internal church governance

Catholic Charities contends the WCEA impermissibly interferes with matters of religious doctrine and internal church governance. In support of the contention, Catholic Charities invokes the rule that the state must accept the decision of appropriate church authorities on such matters. This is the rule of the so-called church property cases. (E.g., *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 708-709; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 445-449; *Kreshik v. St. Nicholas Cathedral* (1960) 363 U.S. 190, 191; *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 109-121; *Gonzalez v. Archbishop* (1929) 280 U.S. 1, 16-17; *Watson v. Jones* (1871) 80 U.S. 679, 727.) That rule does not dispose of this case.

The first church property case to reach the United States Supreme Court, *Watson v. Jones*, *supra*, 80 U.S. 679 (*Watson*), articulates the rule and illustrates its proper application. The case arose from a schism in the Presbyterian Church during the Civil War. When the church's national governing body, the General Assembly, expressed its opposition to slavery, various congregations responded by declaring the General Assembly's view heretical and renouncing that body's authority. The General Assembly, in turn, dissolved the schismatic congregations. Civil disputes ensued between rival congregations, each asserting a religious claim to be the only true congregation entitled to use certain local church property. The high court resolved the competing religious claims by deferring to the decision of the General Assembly, thus adopting the rule still in effect today: "[W]henever . . . questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." (*Id.*, at p. 727.) The rule's modern formulation is similar. (*Serbian Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. 696, 709.)

The high court in *Watson*, *supra*, 80 U.S. 679, offered two reasons for deferring to religious authorities on religious questions. The first justification was that civil courts are simply "incompetent" to decide matters of faith and doctrine. (*Id.*, at p. 732.) Courts have no expertise in religious matters, and courts "so unwise" as to attempt to decide them "would only involve themselves in a sea of uncertainty and doubt . . . ." (*Ibid.*; see also *Serbian Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. 696, 714-715 & fn. 8.) The second reason was that the members of a church, by joining, implictly consent to the church's governance in religious matters; for civil courts to review the church's judgments would "deprive these bodies of the right of construing their

own church laws" (*Watson*, at pp. 733-734; see also *id.*, at pp. 728-729) and, thus, impair the right to form voluntary religious organizations (*id.*, at pp. 728-729; cf. *Serbian Orthodox Diocese v. Milivojevich*, *supra*, at pp. 724-725).

Because *Watson*, *supra*, 80 U.S. 679, preceded the First Amendment's incorporation into the Fourteenth, the court did not base its decision on the Constitution. In subsequent cases, however, the court described *Watson*'s reasoning as having a " 'clear constitutional ring' " (*Serbian Orthodox Diocese v. Milivojevich*, *supra*, 426 U.S. 696, 710, quoting *Presbyterian Church v. Hull Church*, *supra*, 393 U.S. 440, 446; cf. *Watson*, at pp. 728-729) and *Watson*'s holding as compelled by the religion clauses of the First Amendment (*Serbian Orthodox Diocese v. Milivojevich*, *supra*, at pp. 724-725; *Kedroff v. St. Nicholas Cathedral*, *supra*, 344 U.S. 94, 115-116; see also *Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872, 877). The high court has also held that legislatures are bound by the same constitutional limitations *Watson* articulated for the courts. (*Kedroff v. St. Nicholas Cathedral*, *supra*, at pp. 117-121.)

Catholic Charities asserts that the Legislature, in enacting the WCEA, violated the rule of church property cases by interfering with matters of internal church governance and by rejecting the Catholic Church's decision that prescription contraceptives are sinful. These assertions are incorrect. This case does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline. (*Watson*, *supra*, 80 U.S. 679, 729.) Certainly the WCEA conflicts with Catholic Charities' religious beliefs, but this does not mean the Legislature has decided a religious question. Congress has created, and the high court has resolved, similar conflicts between

employment law and religious beliefs without deciding religious questions and without reference to the church property cases. (E.g., *Tony and Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 303-306 [religious organization must comply with federal minimum wage laws]; *United States v. Lee* (1982) 455 U.S. 252, 256-261 [Amish employer must pay Social Security and unemployment taxes].) Neither does this case require us to decide any religious questions. Instead, we need only apply the usual rules for assessing whether state-imposed burdens on religious exercise are constitutional. (See *Church of Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 531-533; *Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872, 876-882.) This we do below, in the context of Catholic Charities' separate claims under the free exercise clause. (See p.16 et seq., *post*.)

Catholic Charities also argues the Legislature, by enacting the WCEA, deliberately intervened in a conflict within the Catholic Church on the side of those who disagree with the Church's teachings on contraception. In support of the argument, Catholic Charities notes that one of WCEA's sponsors cited, on the floor of the state Senate, a New York Times poll suggesting that not all Catholic women accept the Church's teachings on contraception, and that "someone who practices artificial birth control can still be a good Catholic." Commenting on the poll, the senator said, "I agree with that. I think it's time to do the right thing." Certainly the state may not "lend its power to one or the other side in controversies over religious authority or dogma . . . ." (*Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872, 877.) However, the Legislature's motivation cannot reliably be inferred from a single senator's remarks. Other legislators who voted to enact the WCEA might well have done so because they wished to reduce the inequitable financial burden of health care on women, without regard to any religious dispute over the propriety of artificial contraception.

While the church property cases thus do not invalidate the WCEA, the constitutional principles that underlie those cases may place an outer limit on the statute's constitutional application. Relying on the church property cases, lower federal courts have held that the First Amendment bars courts from reviewing employment decisions by religious organizations affecting employees with the religious duties of ministers. (*McClure v. Salvation Army* (5th Cir. 1972) 460 F.2d 553, 558-561; see also *Gellington v. Christian Methodist Episcopal Church* (11th Cir. 2000) 203 F.3d 1299, 1301-1304; *Combs v. Cen Tx Ann Conf United Methodist Church* (5th Cir. 1999) 173 F.3d 343, 345-350.) The rule that emerges from these decisions is sometimes called the "ministerial exception," because it operates as a nonstatutory, constitutionally compelled exception to title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e et seq., hereafter title VII.)

The Fifth Circuit first recognized the ministerial exception in *McClure v. Salvation Army*, *supra*, 460 F.2d 553. The plaintiff, a former officer of the Salvation Army, alleged that her termination was motivated by sex discrimination violating title VII. To avoid doubts about title VII's constitutionality as applied to religious organizations, the court construed the law as not governing the relationship between a church and its ministers. Judicial review of a minister's salary and duties, the court reasoned, would "intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern." (*McClure v. Salvation Army*, *supra*, at p. 560.) Although the United States Supreme Court has not spoken on the ministerial exception, the lower federal courts have widely embraced it, applying it both to ministers and to a variety of nonordained employees with duties functionally equivalent to those of ministers. (E.g., *Alicea-Hernandez v. Catholic Bishop of Chicago* (7th Cir. 2003) 320 F.3d 698, 700-704

[Hispanic communications manager for Archdiocese of Chicago, responsible for "shaping the message that the Church presented to the Hispanic community"]; *E.E.O.C. v. Roman Catholic Diocese of Raleigh, NC* (4th Cir. 2000) 213 F.3d 795, 802-805 [cathedral choir director required to assist in planning liturgies]; *E.E.O.C. v. Catholic University of America* (D.C. Cir. 1996) 83 F.3d 455, 461 [professor of canon law at religious university].)

Because the case before us does not involve title VII, the ministerial exception as currently articulated does not apply. Although the constitutional reasoning underlying the ministerial exception might bar the State from applying the WCEA to ministers or clergy employed by a bona fide religious organization that for whatever reason did not qualify under the act's exemption for religious organizations (Health & Saf. Code, § 1367.25, subd. (b); cf. *Schmoll v. Chapman University* (1999) 70 Cal.App.4th 1434, 1438-1444 [recognizing a ministerial exception to the Cal. Fair Employment and Housing Act, Gov. Code, § 12900 et seq.]), we need not decide the question because Catholic Charities does not claim that any of its employees have the religious duties of ministers. Indeed, as noted above, most are not even members of the Catholic Church. In short, the ministerial exception does not dispose of this case. Catholic Charities acknowledges as much.

2. Distinction between religious and secular activities

Catholic Charities next argues that the First Amendment forbids the government to "premis[e] a religious institution's eligibility for an exemption from government regulation upon whether the activities of the institution are deemed by the government to be 'religious' or 'secular' . . . ." The argument is directed against the four statutory criteria an employer must satisfy to claim exemption from the WCEA as

a "religious employer." (Health & Saf. Code, § 1367.25, subd. (b)(1)(A)-(D); see p. 5, *ante*.) The argument lacks merit.

The exception to the WCEA accommodates religious exercise by relieving statutorily defined "religious employers" (Health & Saf. Code, § 1367.25, subd. (b)) of the burden of paying for contraceptive methods that violate their religious beliefs. The United States Supreme Court has long recognized that the alleviation of significant governmentally created burdens on religious exercise is a permissible legislative purpose that does not offend the establishment clause. (*Corporation of Presiding Bishop v. Amos* (1978) 483 U.S. 327, 334-335; *Hobbie v. Unemployment Appeals Comm'n of Fla.* (1987) 480 U.S. 136, 144-145; cf. *Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872, 890.) Such legislative accommodations would be impossible as a practical matter if the government were, as Catholic Charities argues, forbidden to distinguish between the religious entities and activities that are entitled to accommodation and the secular entities and activities that are not. In fact, Congress and the state legislatures have drawn such distinctions for this purpose, and laws embodying such distinctions have passed constitutional muster. (E.g., *Corporation of Presiding Bishop v. Amos*, *supra*, 483 U.S. 327, 334-340 [upholding statutory exemption of "religious" employers from liability for religious discrimination; 42 U.S.C. § 2000e-1(a)]; *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 704-718 [upholding state laws exempting "religiously affiliated" organizations from landmark preservation laws, Gov. Code, §§ 25373, subds. (c) & (d), 37361, subd. (c)].)

Catholic Charities' argument to the contrary largely depends on a single lower federal court decision, *Espinosa v. Rusk* (10th Cir. 1980) 634 F.2d 477 (*Espinosa*). In that case, the court invalidated an antisolicitation ordinance because,

among other things, it "involve[d] municipal officials in the definition of what is religious." (*Id.*, at p. 481.) But whatever *Espinosa* might purport to hold, the decision could not supersede the United States Supreme Court's repeated holding that the government may constitutionally exempt religious organizations from generally applicable laws in order to alleviate significant governmentally imposed burdens on religious exercise. (*Corporation of Presiding Bishop v. Amos*, *supra*, 483 U.S. 327, 334-335; *Hobbie v. Unemployment Appeals Comm'n of Fla.*, *supra*, 480 U.S. 136, 144-145; *Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872, 890.) In any event, the court in *Espinosa* addressed the different problem of content-based prior restraints on speech. The court struck down an ordinance that gave municipal officials, in effect, the power to decide in advance which messages the city's residents would be permitted to hear by requiring the officials, before granting a permit, to determine that the applicant's purpose for soliciting funds was truly religious. The ordinance thus violated *Cantwell v. Connecticut* (1940) 310 U.S. 296, 305-307, which permits the government to regulate the time, place and manner of religious solicitations but not to censor them altogether based on an assessment of the content of speech. (*Espinosa*, at pp. 480-482.) The WCEA, which places no restrictions on speech, does not present the problem addressed in *Cantwell v. Connecticut* and *Espinosa*.

Our conclusion that the government may properly distinguish between secular and religious entities and activities for the purpose of accommodating religious exercise does not mean that any given statute purporting to draw such distinctions necessarily passes muster under the free exercise clause. "[A] law targeting religious beliefs as such is never permissible," and a court " 'must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.' " (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, 508 U.S. 520,

533-534, quoting *Walz v. Tax Commission* (1970) 397 U.S. 664, 696 (conc. opn. of Harlan, J.).) We address below Catholic Charities' separate argument that the WCEA's definition of "religious employer" in fact embodies a legislative effort to target Catholic organizations for unfavorable treatment. (See p. 23 et seq., *post.*)

3. Excessive entanglement

Catholic Charities contends that the WCEA's exemption for "religious employer[s]" (Health & Saf. Code, § 1367.25, subd. (b)) violates the establishment clause by mandating an entangling inquiry into the employer's religious purpose and into its employees' and clients' religious beliefs. The argument refers to the first three of the four statutory criteria for identifying a "religious employer," namely, whether "[t]he inculcation of religious values is the purpose of the entity" (*id.*, subd. (b)(1)(A)), whether "[t]he entity primarily employs persons who share the religious tenets of the entity" (*id.*, subd. (b)(1)(B)), and whether "[t]he entity serves primarily persons who share the religious tenets of the entity" (*id.*, subd. (b)(1)(C)). A law that fosters an excessive governmental entanglement with religion can for that reason violate the establishment clause. (*Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613.) [6] Moreover, recent judicial opinions have criticized rules and laws that invite official "trolling through a person's or institution's religious beliefs." (*Mitchell v. Helms* (2000) 530 U.S. 793, 828 (plur. opn. of

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[6] The court in *Lemon v. Kurtzman*, *supra*, 403 U.S. 602, "gleaned from [its prior] cases" three tests for determining whether a statute violates the establishment clause: "First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive governmental entanglement with religion.' " (*Id.*, at pp. 612-613, quoting *Walz v. Tax Commission*, *supra*, 397 U.S. 664, 674.)

Thomas, J.); *University of Great Falls v. N.L.R.B.* (D.C. Cir. 2002) 278 F.3d 1335, 1342-1348.)

The argument might have merit as applied to a hypothetical employer that sought to qualify under the WCEA's exemption for religious employers (Health & Saf. Code, § 1367.25, subd. (b)) but objected on establishment clause grounds to an entangling official effort to verify that its purpose was the inculcation of religious values, and that it primarily employed and served persons who shared its religious tenets. But Catholic Charities candidly alleges in its complaint that it does not qualify under the exemption because it does not satisfy any of the four criteria. More specifically, Catholic Charities concedes that its purpose is not the inculcation of religious values, that it does not primarily hire and serve Catholics, and that it does not fall within either of the relevant provisions of the Internal Revenue Code (26 U.S.C. § 6033(a)(2)(A)(i) and (iii), cited in Health & Saf. Code, § 1367.25, subd. (b)(1)(D)). Consequently, no entangling inquiry into Catholic Charities' purpose or beliefs, or the beliefs of its employees and clients, has occurred or is likely to occur. Therefore, even if in some other case the statute might require an entangling inquiry, in this case, as applied to Catholic Charities, the establishment clause offers no basis for holding the statute unconstitutional.

B. Free Exercise of Religion

Catholic Charities argues the WCEA violates the free exercise clauses of the federal and state Constitutions (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4) by coercing the organization to violate its religious beliefs, in that the WCEA, by regulating the content of insurance policies, in effect requires employers who offer their workers insurance for prescription drugs to offer coverage for prescription contraceptives. Catholic Charities wishes to offer insurance,

but may not facilitate the use of contraceptives without violating its religious beliefs.

Any analysis of Catholic Charities' free exercise claim must take into consideration the United States Supreme Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith*, *supra*, 494 U.S. 872 (*Smith*). In *Smith*, the high court articulated the general rule that religious beliefs do not excuse compliance with otherwise valid laws regulating matters the state is free to regulate. (*Id.*, at pp. 877-882.) The government may not regulate religious beliefs as such by compelling or punishing their affirmation. (*Id.*, at p. 877.) Nor may it target conduct for regulation only because it is undertaken for religious reasons. (*Ibid.*) But "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " (*Smith*, at p. 879, quoting *United States v. Lee*, *supra*, 455 U.S. 252, 263, fn. 3 (conc. opn. of Stevens, J.).) To permit religious beliefs to excuse acts contrary to law, the *Smith* court reasoned, " 'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.' " (*Smith*, at p. 879, quoting *Reynolds v. United States* (1879) 98 U.S. 145, 167.)

Before *Smith*, *supra*, 494 U.S. 872, the high court had taken a variety of approaches to assessing the constitutionality of laws claimed to burden the free exercise of religion. In some cases, notably *Sherbert v. Verner* (1963) 374 U.S. 398, 403-409 (*Sherbert*) and *Wisconsin v. Yoder* (1972) 406 U.S. 205, 220-229, the court had examined such laws under strict scrutiny, reasoning that a law substantially burdening religious practice must be narrowly tailored to serve a compelling state interest. In other cases, both before and after *Sherbert*, the court had upheld laws and

governmental actions challenged under the free exercise clause without applying strict scrutiny.[7]

Eight years before *Smith*, *supra*, 494 U.S. 872, Justice Stevens wrote that most of the court's holdings were better explained not by the strict scrutiny test of *Sherbert*, *supra*, 374 U.S. 398, as by "a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religious prescribes (or proscribes) . . . ." (*United States v. Lee*, *supra*, 455 U.S. 252, 263, fn. 3 (conc. opn. of Stevens, J.).) After *Lee*, the court again upheld laws claimed to burden free exercise, either without mentioning *Sherbert*, or while mentioning *Sherbert* but declining to apply its test.[8] This

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[7] *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439 (Native American free exercise challenge to governmental logging and road construction activities); *O'Lone v. Estate of Shabazz* (1987) 482 U.S. 342 (prison regulations); *Goldman v. Weinberger* (1986) 475 U.S. 503 (military dress regulations); *Gillette v. United States* (1971) 401 U.S. 437 (selective service law); *Braunfeld v. Brown* (1961) 366 U.S. 599 (Sunday closing law); *Prince v. Massachusetts* (1944) 321 U.S. 158 (child labor law); *Jacobson v. Massachusetts* (1905) 197 U.S. 11 (compulsory vaccination law); *Reynolds v. United States*, *supra*, 98 U.S. 145 (polygamy law).

[8] *Lyng v. Northwest Indian Cemetery Prot. Assn.*, *supra*, 485 U.S. 439, 450-453; *O'Lone v. Estate of Shabazz*, *supra*, 482 U.S. 342, 348-353; *Goldman v. Weinberger*, *supra*, 475 U.S. 503, 506-510.

In *Bowen v. Roy* (1986) 476 U.S. 693, the high court did not decide whether the free exercise clause barred the federal government from requiring Native American welfare applicants, over their religious objections, to provide Social Security numbers. In separate opinions, six justices expressed the view that *Sherbert* would govern the question. (*Id.*, at pp. 715-716 (opn. of Blackmun, J., conc. in part); *id.*, at p. 722 & fn. 17 (opn. of Stevens, J., conc. in part); *id.*, at p. 728 (opn. of O'Connor, J., conc. in part, with Brennan and Marshall, JJ., conc.); *id.*, at p. 733 (dis. opn. of White, J.).) Three justices disagreed. (*Id.*, at p. 708 (plur. opn. of Burger, C.J., with Powell and Rehnquist, JJ., conc.).)

inconsistency ended with *Smith*, in which the high court repudiated the *Sherbert* test and expressly adopted the standard Justice Stevens had articulated. (*Smith*, at pp. 879, 882-890.) More recently, the court has reaffirmed *Smith* and reiterated "the general proposition that a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, 508 U.S. 520, 531.)

The general rule affirmed in *Smith*, *supra*, 494 U.S. 872, would at first glance appear to dispose of Catholic Charities' free exercise claim. The WCEA's requirements apply neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute's strict requirements for exemption on religious grounds. (Health & Saf. Code, § 1367.25, subd. (b).) The act also addresses a matter the state is free to regulate; it regulates the content of insurance policies for the purpose of eliminating a form of gender discrimination in health benefits. The act conflicts with Catholic Charities' religious beliefs only incidentally, because those beliefs happen to make prescription contraceptives sinful. Accordingly, it appears Catholic Charities may successfully challenge the WCEA only by demonstrating an exception to the general rule.

To demonstrate an exception to the general rule is, in fact, precisely what Catholic Charities seeks to do. On four separate grounds, Catholic Charities argues we should examine the WCEA under strict scrutiny despite the holding of *Smith*, *supra*, 494 U.S. 872. Specifically, Catholic Charities argues that the WCEA is not neutral and generally applicable (see *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, 508 U.S. 520, 533-547), that it constitutes a religious "gerrymander" (see *id.*, at p. 534), and that it

violates so-called hybrid rights (cf. *Smith*, *supra*, 494 U.S. at pp. 881-882). Finally, Catholic Charities argues that the California Constitution requires us to apply strict scrutiny in any event, and that the WCEA fails that test. We address each of these arguments below.

1. Neutrality and general applicability

Catholic Charities offers two arguments why the WCEA should be not considered neutral or generally applicable and should, thus, be subject to strict scrutiny under an exception to the rule of *Smith*, *supra*, 494 U.S. 872. First, Catholic Charities contends the face of the statute demonstrates a lack of neutrality; second, Catholic Charities relies on the WCEA's legislative history and practical effect to argue the Legislature "gerrymandered" the law to reach only Catholic employers. We address these arguments separately, as Catholic Charities has stated them in its brief.

A law is not neutral towards religion if its "object . . . is to infringe upon or restrict practices because of their religious motivation . . . ." (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, 508 U.S. 520, 533 (*Lukumi*).) A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief . . . ." (*Id.*, at p. 543.) Thus, "[n]eutrality and general applicability are interrelated, and . . . [a] failure to satisfy one requirement is a likely indication that the other has not been satisfied." (*Id.*, at p. 531.)

In determining whether the object of a law is to suppress religion or religiously motivated conduct, a court "must begin with [the law's] text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." (*Lukumi*, *supra*, 508 U.S. 520, 533.)

Following this approach, the high court in *Lukumi* found that a city council's use of the words "sacrifice" and "ritual" in an ordinance regulating animal slaughter helped to show, together with other evidence, that the ordinance had been motivated by a desire to suppress the Santeria religion. The lack of facial neutrality fit into a "pattern" of "animosity to Santeria adherents and their religious practices . . . ." (*Id.*, at p. 542.) Not only did "the ordinances by their own terms target [Santeria] religious exercise," so too were "the texts of the ordinances . . . gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings . . . ." (*Ibid.*) Finally, "the ordinances suppress[ed] much more religious conduct than [was] necessary in order to achieve the legitimate ends asserted in their defense [i.e., protecting health and preventing cruelty to animals]." (*Ibid.*)

Relying on *Lukumi*, *supra*, 508 U.S. 520, Catholic Charities argues the WCEA is not neutral because its exemption for religious employers contains religious terms and terminology that lack any secular meaning or purpose. Catholic Charities specifically refers to the terms "inculcation of religious values" and "religious tenets," both of which appear in criteria used in the WCEA to define and exempt "religious employer[s]." (Health & Saf. Code, § 1367.25, subd. (b)(1)(A), (B) & (C).)

Lukumi, *supra*, 508 U.S. 520, is inapposite. The animal sacrifice ordinance challenged in that case referred to religious practices ("sacrifice" and "ritual") in order to *prohibit* them. In that context, the statute's use of religious terminology supported the court's conclusion "that suppression of the central element of the Santeria worship service was the object of the ordinances" there at issue. (*Id.*, at p. 534.) In contrast, the WCEA refers to the religious characteristics of organizations in order to identify and *exempt* those organizations from an otherwise generally applicable duty. Although Catholic Charities cannot claim

the statutory exemption for religious employers, other Catholic organizations may be able to claim it. If the WCEA burdens Catholic Charities' religious beliefs, the burden arises not from the religious terminology used in the exemption, but from the generally applicable requirement to provide coverage for contraceptives. The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice. To the contrary, the court has repeatedly indicated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (*Corporation of Presiding Bishop v. Amos*, *supra*, 483 U.S. 327, 335 (*Amos*); see also *Hobbie v. Unemployment Appeals Comm'n of Fla.*, *supra*, 480 U.S. 136, 144-145; cf. *Smith*, *supra*, 494 U.S. 872, 890.) Furthermore, the state may require an organization "claiming the benefits of [a] religious-organization exemption" from a regulatory statute "to *prove* that [it] is a religious organization within the meaning of the [statute]." (*Larson v. Valente* (1982) 456 U.S. 228, 255, fn. 30, italics added.) To accomplish these purposes without explicitly defining the religious groups and practices to be accommodated, in order to distinguish them from secular groups and practices not entitled to accommodation, would often be impossible.

Because a legislative accommodation benefits religion, it is tested not under the free exercise clause but under the establishment clause. (*Amos*, *supra*, 483 U.S. 327, 334-336.) To comply with the establishment clause, a law must among other things serve a " 'secular legislative purpose.' " (*Id.*, at p. 335, quoting *Lemon v. Kurtzman*, *supra*, 403 U.S. 602, 612.) In this context, the requirement of a secular legislative purpose "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' . . . and the Establishment

Clause has never been so interpreted." (*Amos*, at p. 335, quoting *Zorach v. Clauson* (1952) 343 U.S. 306, 314.) Instead, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (*Amos*, at p. 335.) The references to religion in the WCEA have no other purpose than this. The high court has not "required that legislative categories make no explicit reference to religion." (*Texas Monthly, Inc. v. Bullock* (1989) 489 U.S. 1, 10 (plur. opn. of Brennan, J.).)

A rule barring religious references in statutes intended to relieve burdens on religious exercise would invalidate a large number of statutes. A few examples suffice. The federal statute upheld in *Amos*, *supra*, 483 U.S. 327, for example, exempted from title VII of the Civil Rights Act of 1964 "a religious corporation, association, or educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such a corporation, association, education institution, or society of its activities." (42 U.S.C. § 2000e-1(a).) Similarly, the California Fair Employment and Housing Act uses the term "religious association or corporation" (Gov. Code, § 12926, subd. (d)) in order to exempt certain employers from liability for unlawful employment practices. We recently upheld statutes that refer to "religiously affiliated" associations and their "religious mission[s]" for the purpose of exempting such associations from burdens imposed by a landmark preservation ordinance. (*East Bay Asian Local Development Corp. v. State of California*, *supra*, 24 Cal.4th 693, 702, quoting Gov. Code, §§ 25373, subd. (d), and 37361, subd. (c).) The rule Catholic Charities proposes would invalidate these and many similar laws. Because the high court's decisions provide no support for such a rule, we reject it.

2. Religious gerrymander

Our analysis does not end with the conclusion that the WCEA is facially neutral towards religion. The First Amendment requires more than facial neutrality. It protects against " 'subtle departures from neutrality' " and "governmental hostility which is masked as well as overt." (*Lukumi*, *supra*, 508 U.S. 520, 534, quoting *Gillette v. United States*, *supra*, 401 U.S. 437, 452.) Thus, a court " 'must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.' " (*Ibid.*, quoting *Walz v. Tax Commission*, *supra*, 397 U.S. 664, 696 (conc. opn. of Harlan, J.).) Catholic Charities argues the Legislature gerrymandered the WCEA to deny the benefit of the exemption to Catholic organizations. The law discriminates, Catholic Charities contends, both against the Catholic Church and against religious organizations of any denomination that engage in charitable work, as opposed to work that is purely spiritual or evangelical.

We find no merit in the argument that the WCEA discriminates against the Catholic Church. It was at the request of Catholic organizations that the Legislature added an exception permitting religious employers to deny coverage for "contraceptive methods that are contrary to the religious employer's religious tenets." (Health & Saf. Code, § 1367.25, subd. (b).) Because most religions do not object to prescription contraceptives, most religious employers are subject to the WCEA. The Legislature's decision to grant preferential treatment to religious employers who do object is justifiable as an accommodation of religious exercise under the principles discussed above. (*Amos*, *supra*, 483 U.S. 327, 334-335.) That the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church

does not mean the exemption discriminates against the Catholic Church. [9]

We find nothing to the contrary in *Larson v. Valente*, *supra*, 456 U.S. 228 (*Larson*), the decision on which Catholic Charities principally relies. The high court in *Larson* held unconstitutional under the establishment clause a Minnesota statute that discriminated, in effect, against the Reverend Sun Myung Moon's Unification Church. For many years prior to *Larson*, Minnesota law had regulated charitable solicitations generally but exempted from regulation all solicitations by religious organizations. In 1978, the Minnesota Legislature amended the law to exempt only those religious organizations that received more than 50 percent of their contributions from members or affiliated organizations. Minnesota defended the exemption as intended to prevent abusive solicitations of the public, reasoning that the members of well-established, internally funded churches would exercise enough supervision over fund-raising activities to justify dispensing with state supervision. The high court rejected the argument. In the court's view, the 50-percent rule violated "[t]he clearest command of the Establishment Clause," namely, "that one religious denomination cannot be officially

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[9] Indeed, rather than discriminating against the Catholic Church, the WCEA can more plausibly be viewed as benefiting the Catholic Church in practical effect, since no other religious group opposed to prescription contraceptives has been identified. But the WCEA does not for this reason violate the establishment clause. A law intended not to discriminate among religions but to alleviate a governmentally created burden on religious exercise does not necessarily violate the establishment clause, even though only a single religion in need of accommodation has been identified, if the law is phrased neutrally, to allow for the possibility that other as-yet-unidentified religions in need of the same accommodation will be able to claim it. (See, e.g., *Kong v. Scully* (9th Cir. 2003) 341 F.3d 1132; *Children's Health. Is A Legal Duty v. Min De Parle* (8th Cir. 2000) 212 F.3d 1084; *Droz v. Commissioner of I.R.S.* (9th Cir. 1995) 48 F.3d 1120.)

preferred over another." (*Id.*, at p. 244.) Laws granting denominational preferences must serve compelling governmental interests and be closely fitted to further those interests. (*Id.*, at pp. 246-247.) Minnesota's law failed that test.

The reasoning of *Larson*, *supra*, 456 U.S. 228, does not invalidate the WCEA. The statute invalidated in *Larson* drew an explicit distinction between religious denominations based on their sources of income, and used that distinction to impose a regulatory burden only on certain denominations. In contrast, the WCEA applies to religious and nonreligious organizations equally. The WCEA confers the special benefit of exemption only on those religious organizations whose tenets are opposed to prescription contraceptives and that meet the other requirements for exemption. This benefit, as explained above, is justifiable as a legislative accommodation—an effort to alleviate a governmentally imposed burden on religious exercise. (See *Amos*, *supra*, 483 U.S. 327, 334-335.) Those Catholic employers that do not qualify for exemption are treated precisely the same as all other employers in the state, whether religious or nonreligious. Thus, while the WCEA may treat some Catholic employers more favorably than other employers, the WCEA does not under any circumstance treat Catholic employers less favorably than any other employers. About a law such as this, *Larson* has nothing to say. [10]

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[10] We read *Larson*, *supra*, 456 U.S. 228, as condemning laws that discriminate among *religions* or *religious denominations*. The law held unconstitutional in *Larson* reflected the Minnesota Legislature's "express design . . . to burden or favor selected religious *denominations*" (*id.*, at p. 255, italics added), specifically the Unification Church (*id.*, at pp. 232, 255, fn. 30). Here, in contrast, nothing about the Catholic religion prevents a Catholic religious organization from qualifying under the WCEA's exemption for religious organizations. We assume, for example,

Catholic Charities argues the WCEA violates *Larson*, *supra*, 456 U.S. 228, for the additional reason that the law draws a distinction between religious organizations whose purpose is the "inculcation of religious values" (Health & Saf. Code, § 1367.25, subd. (b)(1)(A)) and other religious organizations that, in Catholic Charities' words, "have the temerity to engage in ministries *other than* the 'inculcation of religious values.' " (Italics in original.) We accept Catholic Charities' assertion that the Catholic Church's "self-understanding compels it to engage in 'corporal works of mercy,' which 'consist especially in feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick and imprisoned, and burying the dead.' " (Quoting Catechism of the Catholic Church (1994) ¶ 2447, p. 588.) However, to the extent Catholic Charities is arguing the WCEA embodies a preference for non-Catholic denominations, the argument fails for the reasons already given.

Catholic Charities' intent may be to argue that the WCEA discriminates against charitable social work *as a religious practice.* Such an argument would implicate "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief . . . ." (*Lukumi*, *supra*, 508 U.S

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that a Catholic diocese or parish, acting as an employer, would typically qualify under the exemption.

In contrast, *Larson*, *supra*, 456 U.S. 228, does not purport to bar a state from attempting for valid regulatory purposes to distinguish among *organizations* based on sect-neutral grounds, even if those organizations claim a religious character. Indeed, *Larson* expressly permits the state to require an organization "claiming the benefits of [a] religious-organization exemption" from a regulatory statute "to *prove* that [it] is a religious organization within the meaning of the [statute]." (*Id.*, at p. 255, fn. 30, italics added.) Were this not true, the mere claim of religious character would effectively preclude state regulation.

520, 543.) Applying this principle, the high court in *Lukumi* held unconstitutional an ordinance that permitted the killing of animals for food or sport, but not in religious rituals. The ordinance had " 'every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' " (*Id.*, at p. 545, quoting *The Florida Star v. B.J.F.* (1989) 491 U.S. U.S. 524, 542.) The WCEA is not similar. If a religiously affiliated organization fails to qualify for exemption because its purpose is something other than the "inculcation of religious values" (Health & Saf. Code, § 1367.25, subd. (b)(1)(A)), then the result is simply that the organization becomes subject to the same obligations that apply to all other employers. Because the WCEA applies to all nonreligious employers engaged in charitable social work, no argument can logically be made that the WCEA imposes a burden on charitable social work only when performed for religious reasons.

As additional support for its claim that the WCEA's purpose is to discriminate against the Catholic Church, Catholic Charities contends the Legislature drafted the "religious employer" exception (Health & Saf. Code, § 1367.25, subd. (b)) with the specific intention of excluding Catholic hospitals and social service agencies like Catholic Charities. Catholic Charities draws an analogy to *Lukumi*, *supra*, 508 U.S. 520, 540-542, in which the high court considered specific statements by members of the Hialeah City Council as evidence that the ordinance prohibiting animal sacrifice was intended to suppress the Santeria religion. Catholic Charities' assertions about the legislative history of the WCEA do not justify a similar conclusion in this case.

According to Catholic Charities, the history of the WCEA suggests the Legislature intended the law to close a "Catholic gap" in insurance coverage for prescription contraceptives. The evidence does not support the

contention. The phrase "Catholic gap" appears only in Catholic Charities' brief, not in the legislative history. Catholic Charities refers to the Senate testimony of a representative of Planned Parenthood, which opposed any exception for religious employers. Explaining that organization's position, the witness stated: "Primarily our intent was to close the gap in insurance coverage for contraception and prescription benefit plans. Our concern with granting an exemption is that that defeats the original purpose of the bill." The "gap" to which the witness apparently referred was the gap identified by a national consulting firm's 1999 study of health insurance for prescription contraceptives. This study, which received much attention in the Legislature, concluded that approximately 10 percent of commercially insured Californians did not already have insurance coverage for prescription contraceptives. The study identified this minority not as the employees of Catholic organizations, but as persons covered by PPO and indemnity plans. While most HMO's covered prescription contraceptives, not all PPO and indemnity plans did. Catholic Charities' assertion that the purpose of the WCEA was to close a "Catholic gap" rather than a statewide statistical gap in coverage has no apparent evidentiary support.[11]

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[11] Catholic Charities also argues that the Legislature acted out of antipathy and spite towards the Catholic Church. Through this argument, Catholic Charities seeks to compare the Legislature's consideration of the WCEA with the Hialeah City Council's decision (see *Lukumi*, *supra*, 508 U.S. 520) to ban animal sacrifice as a way of suppressing the Santeria religion. In discussing the council's decision, the high court noted that Hialeah city officials had castigated Santeria as an "abomination to the Lord" and "the worship of demons," and that a public crowd attending the city council's meeting had interrupted with jeers and taunts the President of the Santeria Church. (*Id.*, at p. 541.) The legislative history of the WCEA discloses no comparable antipathy to the Catholic Church.

Next, Catholic Charities argues the Legislature deliberately narrowed the statutory exception for "religious employer[s]" (Health & Saf. Code, § 1367.25, subd. (b)) to include as few Catholic organizations as possible and specifically to exclude Catholic hospitals and social service organizations. The legislative history does show that the bill's sponsors argued against a broader exception. The bill's Senate sponsor, for example, stated in a committee hearing that "the intention of the authors as it relates to creating a religious exemption may not be the same intentions of the religions themselves in wanting to be exempted. [¶] The intention of the religious exemption in both these bills is an intention to provide for exemption for what is religious activity. The more secular the activity gets, the less religiously based it is, and the more we believe that they should be required to cover prescription drug benefits for contraception." Catholic Charities describes this and similar statements as evidence that the Legislature targeted specific Catholic organizations for disadvantageous treatment. But we have already examined and rejected that argument. The law treats some Catholic organizations more favorably than all other employers by exempting them; nonexempt Catholic organizations are treated the same as all other employers.

3. Hybrid rights

As an additional argument for applying strict scrutiny to its federal free exercise claim, Catholic Charities argues that the WCEA violates so-called hybrid rights. The term "hybrid rights" is loosely derived from *Smith*, *supra*, 494 U.S. 872, in which the high court repudiated the strict scrutiny test of *Sherbert*, 374 U.S. 398. (See *Smith*, at pp. 882-884.) Along the way to that conclusion, the court distinguished certain of its prior decisions as having involved not just the free exercise clause but other constitutional provisions as well. Specifically, the court stated that "[t]he only decisions in which we have held that the First Amendment bars

application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press [12] . . . , or the right of parents . . . to direct the education of their children [13] . . . ." (*Id.*, at p. 881.) The facts of *Smith*, the court observed, did "not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." (*Smith*, at p. 882.)

Relying on this passage from *Smith*, *supra*, 494 U.S. 872, Catholic Charities argues the WCEA violates hybrid rights and, thus, requires us to apply strict scrutiny to its free exercise claim. The other rights violated, Catholic Charities asserts, are those protected by the free speech and establishment clauses of the First Amendment. (U.S. Const., 1st Amend.)

The high court has not, since the decision in *Smith*, *supra*, 494 U.S. 872, determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim. Justice Souter has mentioned hybrid rights in a concurring opinion, but only to criticize *Smith*'s reliance on the concept. (*Lukumi*, *supra*, 508 U.S. 520, 567 (opn. of Souter, J., conc. in part).) Some of the lower federal courts have treated the relevant passage from *Smith* as dictum and declined to apply, to assertedly hybrid claims, a standard stricter than the rational basis test. (*Leebaert v. Harrington*

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12 Namely, *Follett v. McCormick* (1944) 321 U.S. 573, *Murdock v. Pennsylvania* (1943) 319 U.S. 105, and *Cantwell v. Connecticut*, *supra*, 310 U.S. 296; see *Smith*, *supra*, 494 U.S. 872, 881.

13 Namely, *Wisconsin v. Yoder*, *supra*, 406 U.S. 205, and *Pierce v. Society of Sisters* (1925) 268 U.S. 510; see *Smith*, *supra*, 494 U.S. 872, 881.

(2d Cir. 2003) 332 F.3d 134, 143-144; *Kissinger v. Board of Trustees* (6th Cir. 1993) 5 F.3d 177, 180.) Other lower federal courts appear to have assumed that hybrid claims trigger a higher level of scrutiny, but have concluded that "a plaintiff does not allege a hybrid-rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." (*Miller v. Reed* (9th Cir. 1999) 176 F.3d 1202, 1208; see also *Civil Lib. for Urban Believers v. City of Chicago* (7th Cir. 2003) 342 F.3d 752, 765; *Swanson by and through Swanson v. Guthrie ISD I-L* (10th Cir. 1998) 135 F.3d 694, 700.)

Catholic Charities argues that the non-free-exercise component of a hybrid claim need only be "colorable" and not ultimately meritorious. While some courts have proposed such a rule (e.g., *Miller v. Reed*, *supra*, 176 F.3d 1202, 1207; *Swanson by and through Swanson v. Guthrie ISD I-L*, *supra*, 135 F.3d 694, 700), no court has relied on it to grant relief. Nor would such a rule make sense. As Justice Souter has explained, "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . ." (*Lukumi*, *supra*, 508 U.S. 520, 567 (opn. of Souter, J., conc. in part).) For this reason, the Sixth Circuit has rejected as "completely illogical" the proposition that "the legal standard [of review] under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights." (*Kissinger v. Board of Trustees*, *supra*, 5 F.3d 177, 180 & fn. 1.)

We are aware of no decision in which a federal court has actually relied solely on the hybrid rights theory to justify applying strict scrutiny to a free exercise claim. Indeed, the only federal decision that can properly be said to have relied on the theory at all is *E.E.O.C. v. Catholic University of America*, *supra*, 83 F.3d 455, 467, in which the court

mentioned hybrid rights as an alternative basis for its conclusion that federal employment law could not be applied to require a Catholic educational institution to grant tenure to a professor of canon law. The principal basis for the court's holding was the ministerial exception. (*Id.*, at pp. 463-465; see *ante*, at p. 11 et seq.)[14]

Assuming for the sake of argument the hybrid rights theory is not merely a misreading of *Smith*, *supra*, 494 U.S. 872, Catholic Charities has not alleged a meritorious constitutional claim that might justify the theory's application to this case. Catholic Charities argues that to assist in providing employees with insurance for prescription contraceptives would be viewed as an endorsement of their use and that the WCEA, by compelling such assistance, violates the free speech clause by requiring the organization to engage in symbolic speech it finds objectionable. The argument lacks merit. Certainly "the First Amendment may prevent the government from compelling individuals to express certain views . . . ." (*United States v. United Foods, Inc.* (2001) 533 U.S. 405, 410, citing *Wooley v. Maynard* (1977) 430 U.S. 705, 713-717 [state may not compel unwilling motorists to display state motto, "Live Free or Die," on vehicle license plates], and *Board of Education v. Barnette* (1943) 319 U.S. 624, 630-642 [state may not compel public school pupils to salute the flag or recite the Pledge of Allegiance].) However, Catholic Charities' compliance with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them. For purposes of the free speech clause,

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[14] A few state courts have mentioned the hybrid-rights theory. (*First Covenant Church v. Seattle* (Wash. 1992) 840 P.2d 174, 181-182 [alternative ground for decision]; *City Chapel v. South Bend* (Ind. 2001) 744 N.E.2d 443, 452-454 (plur. opn. of Dickson, J.).)

simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition. (Cf. *Buhl v. Hannigan* (1993) 16 Cal.App.4th 1612, 1626 & fn. 11 [dismissing as "ludicrous" a motorcyclist's claim that compliance with a law requiring the wearing of helmets in effect compelled speech supporting the law, regardless of the motivation for noncompliance].)[15]

4. California Constitution

Catholic Charities' final argument for applying strict scrutiny invokes the free exercise clause of the California Constitution. (Cal. Const., art. I, § 4.)[16] That clause, Catholic Charities contends, forbids the state to burden the practice of religion, even incidentally, through a neutral, generally applicable law, unless the law in question serves a compelling governmental interest and is narrowly tailored to achieve that interest. Catholic Charities asserts, in other words, that we must interpret the California Constitution the same way the United States Supreme Court interpreted the federal Constitution's free exercise clause in *Sherbert*, *supra*, 374 U.S. 398.

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[15] Catholic Charities perfunctorily asserts that its claims under the establishment clause (U.S. Const., 1st Amend.) also justify treating this case as involving hybrid rights. We have, however, already determined that those claims lack merit.

[16] "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. . . ." (Cal Const., art. I, § 4.)

What might be the proper standard of review for challenges to neutral, generally applicable laws under the state Constitution's free exercise clause is a question we left open in *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1177-1179 (*Smith v. FEHC*). There we rejected, under both federal and state law, a landlord's religiously based claim to exemption from a fair housing statute prohibiting discrimination on the basis of marital status. (Gov. Code, § 12955, subd. (a).) Although the case arose after the high court's decision in *Smith*, *supra*, 494 U.S. 872, we nevertheless applied strict scrutiny to the landlord's federal claim because the Religious Freedom Restoration Act required us to do so. (42 U.S.C. § 2000bb et seq., hereafter RFRA; see *Smith v. FEHC*, at pp. 1165-1167.)[17] We did not decide whether the landlord's claim under the state Constitution's free exercise clause required strict scrutiny. A plurality of three justices assumed for the sake of argument that it did, but declined to "address the scope and proper interpretation of California Constitution, article I, section 4." (*Smith v. FEHC*, at p. 1179 (plur. opn. of Werdegar, J., George and Arabian, JJ., conc.).) "These important questions," the plurality wrote, "should await a case in which their resolution affects the outcome." (*Ibid.*) Justice Mosk's concurring opinion provided a fourth vote for the disposition. (*Id.*, at pp. 1179-1192 (conc. opn. of Mosk, J.).)

No decision about the appropriate standard of review can be gleaned from the various separate opinions in *Smith v. FEHC*, *supra*, 12 Cal.4th 1143. The subject of Justice Mosk's concurring opinion was his view that RFRA was unconstitutional; he did not address the state Constitution. (*Smith v. FEHC*, at pp. 1179-1192 (conc. opn. of Mosk, J.).) Justice Kennard, who also wrote separately, would have held

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[17] The United States Supreme Court subsequently held RFRA unconstitutional. (*City of Boerne v. Flores* (1997) 521 U.S. 507.)

that the challenged law violated RFRA; she, too, did not address the state Constitution. (*Id.*, at pp. 1192-1218 (conc. & dis. opn. of Kennard, J.).) Justice Baxter, who otherwise agreed with Justice Kennard, wrote separately to emphasize the point we now make, namely, that the court's various opinions left unsettled "the scope of protection of religious liberty under the free exercise clause of our state Constitution." (*Id.*, at p. 1250 (conc. & dis. opn. of Baxter, J., with Lucas, C.J., conc.).)

The only published decision purporting to determine the standard of review for claims under the California Constitution's free exercise clause is *Brunson v. Department of Motor Vehicles* (1999) 72 Cal.App.4th 1251. The Court of Appeal in *Brunson* rejected the contention that the plaintiffs' religious beliefs excused them from complying with a statutory duty (Veh. Code, §§ 1653.5, 12800, subd. (a)) to provide their Social Security numbers to the Department of Motor Vehicles when applying for drivers' licenses. The court interpreted *Smith v. FEHC*, *supra*, 12 Cal.4th 1143, as mandating application of the rational basis test to the petitioners' claims under the state free exercise clause. (*Brunson v. Department of Motor Vehicles*, *supra*, at pp. 1255-1256.) The court's reading of *Smith v. FEHC* was erroneous. As we have just explained, in *Smith v. FEHC* we left the question open.[18] The Court of Appeal in the case before us, while acknowledging *Brunson*, examined the question independently and concluded that challenges under

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[18] While the court in *Brunson v. Department of Motor Vehicles*, *supra*, 72 Cal.App.4th 1251, thus misinterpreted *Smith v. FEHC*, *supra*, 12 Cal.4th 1143, we have no occasion to reexamine the *Brunson* court's ultimate conclusion about the validity of the statutes at issue in that case. We note the Legislature recently amended Vehicle Code sections 1653.5 and 12800, subdivision (a), to permit the Department of Motor Vehicles to accept appropriate numbers and identifiers other than Social Security numbers. (Stats. 2003, ch. 326, §§ 1, 2.)

the state free exercise clause to neutral, generally applicable laws should be evaluated under the rational basis standard of *Smith*, *supra*, 494 U.S. 872.

Certainly the high court's decision in *Smith*, *supra*, 494 U.S. 872, does not control our interpretation of the state Constitution's free exercise clause. Neither does the decision in *Sherbert*, *supra*, 374 U.S. 398. We have observed many times "that the meaning of the California Constitution article I, section 4 . . . is not dependent on the meaning of any provision of the federal Constitution. The state charter declares in so many words that '[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.' (Cal. Const., art. I, § 24.) 'Respect for our Constitution as 'a document of independent force' [citation] forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter.' " (*Smith v. FEHC*, *supra*, 12 Cal.4th 1143, 1177, quoting *People v. Pettingill* (1978) 21 Cal.3d 231, 248, and *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550.) Thus, if a settled interpretation of the California Constitution's free exercise clause had existed before 1990, when the United States Supreme Court abandoned the *Sherbert* test, we would simply adhere to that interpretation, regardless of *Smith*, *supra*, 494 U.S. 872.

However, no settled interpretation of the state Constitution's free exercise clause existed in 1990. Between the dates of *Sherbert*, *supra*, 374 U.S. 398, and *Smith*, *supra*, 494 U.S. 872, our own decisions assessing the constitutionality of neutral, generally applicable laws that incidentally burdened religious practices applied the federal and state free exercise clauses interchangeably, without ascribing any independent meaning to the state clause. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 138-141; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1112-1120; *In re Arias* (1986) 42 Cal.3d 667, 692 & fn. 28; *People*

v. Woody (1964) 61 Cal.2d 716, 718, fn. 1.) In decisions prior to *Sherbert*, we generally took an approach similar to the high court's decisions of the same era, declining to exempt religiously motivated conduct from neutral, generally applicable laws. We wrote, for example, that "a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective." (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 470.) We also wrote that, "[i]f the applicability of government regulation turned on the religious motivation of activities, plausible motivations would multiply and in the end vitiate any regulation." (*Gospel Army v. City of Los Angeles* (1945) 27 Cal.2d 232, 243; see also *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85, 90-92 [declining to reinstate a pupil expelled from public school for refusing on religious grounds to salute the flag]; *Ex parte Andrews* (1861) 18 Cal. 678, 683-685 [upholding a Sunday closing law].)

In view of this history, we may safely agree with the scholars who concluded in 1993, years after the high court decided *Smith*, *supra*, 494 U.S. 872, that "[s]ection 4 has not so far played an independent role in free exercise claims." (Grodin et al., The Cal. State Constitution: A Reference Guide (1993) p. 44.)

In a case that truly required us to do so, we should not hesitate to exercise our responsibility and final authority to declare the scope and proper interpretation of the California Constitution's free exercise clause. (Cal. Const., art. I, § 4.) Here, however, we need not do so because Catholic Charities' challenge to the WCEA fails in any event. As we explain below, the statute passes strict scrutiny. A future case might lead us to choose the rule of *Sherbert*, *supra*, 374 U.S. 398, the rule of *Smith*, *supra*, 494 U.S. 872, or an as-yet unidentified rule that more precisely reflects the language and

history of the California Constitution and our own understanding of its import. But "[t]hese important questions should await a case in which their resolution affects the outcome." (*Smith v. FEHC*, *supra*, 12 Cal.4th 1143, 1179.)

We therefore review Catholic Charities' challenge to the WCEA under the free exercise clause of the California Constitution in the same way we might have reviewed a similar challenge under the federal Constitution after *Sherbert*, *supra*, 374 U.S. 398, and before *Smith*, *supra*, 494 U.S. 872. In other words, we apply strict scrutiny. Under that standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored. (See *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 718; *Sherbert*, *supra*, 374 U.S. 398, 403, 406, 407-408.) For these purposes, a law substantially burdens a religious belief if it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . ." (*Thomas v. Rev. Bd., Ind. Empl. Sec. Div.*, *supra*, 450 U.S. 707, 717-718.)

Applying this standard, we consider first whether the WCEA in fact burdens Catholic Charities' religious beliefs. We do not doubt Catholic Charities' assertion that to offer insurance coverage for prescription contraceptives to its employees would be religiously unacceptable. Catholic Charities adequately supports the assertion with the declaration of a Roman Catholic priest who serves as Executive Director of the Secretariat for Doctrine and Pastoral Practices of the National Conference of Roman Catholic Bishops. Catholic Charities may, however, avoid this conflict with its religious beliefs simply by not offering

coverage for prescription drugs. The WCEA applies only to employers who choose to offer insurance coverage for prescription drugs; it does not require any employer to offer such coverage.

Anticipating this objection, Catholic Charities argues that its religious beliefs also require it to offer its employees insurance for prescription drugs. On this point, however, the declaration just mentioned seems open to interpretation. The declarant states: "The clear teaching and firm doctrine of the Roman Catholic Church is that all employers, religious or otherwise, are to provide just wages and benefits to employees, regardless of their religious affiliations and beliefs, as an obligation arising from the Gospel message of justice and charity. The goal of the Roman Catholic Church, also as a matter of justice and charity, is that all workers regardless of their circumstances should receive adequate health-care coverage." In the present context—that of weighing an asserted burden on religious beliefs against the state interests supporting a challenged statute—the declaration raises the question whether Catholic Charities' beliefs about the requirements of "justice and charity" are necessarily equivalent to *religious* beliefs. We must ask this question because a claim under the free exercise clause must be "rooted in religious belief" and not on "philosophical" choices or "[a] way of life, however virtuous and admirable." (*Wisconsin v. Yoder*, *supra*, 406 U.S. 205, 215, 216.) "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." (*Id.*, pp. 215-216, footnote omitted.)[19]

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[19] Assuming the obligation to provide adequate health care coverage is a religious belief, one might also ask whether a religious

The need to ask questions such as these places a court in an uncomfortable position. "Repeatedly and in many different contexts," the high court has "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." (*Smith*, *supra*, 494 U.S. 872, 887.) The line between construing Catholic Charities' declaration, which we must do, and determining the plausibility of religious claims, which we may not do, is fine indeed. Equally fine is the line between construing the declaration and determining whether the asserted burden falls on a protected religious belief or an unprotected philosophical choice, which we also must do. (*Wisconsin v. Yoder*, *supra*, 406 U.S. 205, 215-216.) If we had to ask and answer these difficult questions, we would. But we need not do so because Catholic Charities' claim fails in any event: Assuming for the sake of argument the WCEA substantially burdens a religious belief or practice, the law nevertheless serves a compelling state interest and is narrowly tailored to achieve that interest.

The WCEA serves the compelling state interest of eliminating gender discrimination. Evidence before the Legislature showed that women during their reproductive years spent as much as 68 percent more than men in out-of-

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employer opposed to contraceptives on religious grounds could avoid all conflict with its beliefs by declining coverage for prescription drugs (thus satisfying the WCEA) while offering its employees a raise to offset the reduced benefits, accompanied by whatever condemnations of contraceptives the employer wished to offer. A raise might be far more expensive for the employer than insurance, and a law that indirectly made a religious practice more expensive might at some point become a constitutionally significant burden on religious exercise. However, "it cannot be expected, much less required that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." (*Braunfeld v. Brown*, *supra*, 366 U.S. 599, 605.)

pocket health care costs, due in part to the cost of prescription contraceptives and the various costs of unintended pregnancies, including health risks, premature deliveries and increased neonatal care. (See p. 2, *ante*.) Assembly, Senate and legislative staff analyses of the bills that became the WCEA consistently identify the elimination of this economic inequity as the bills' principal object. Catholic Charities, which pays men and women equal wages, argues the type of inequity that prompted the WCEA cannot properly be viewed as gender discrimination. To identify subtle forms of gender discrimination, however, is within the Legislature's competence. Nor is the identification irrational.[20] Congress, making a similar identification, amended title VII to define discrimination "on the basis of sex" as including discrimination in benefits "on the basis of pregnancy, childbirth, or related medical conditions . . . ." (42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act), abrogating *General Electric Co. v. Gilbert* (1976) 429 U.S. 125; see *Newport News Shipbuilding & Dry Dock v. EEOC* (1983) 462 U.S. 669, 678 [acknowledging abrogation].) The only reported federal decision addressing the issue holds that the statute just quoted requires employers to include coverage for prescription contraceptives when offering health care plans that cover prescription drugs. (*Erickson v. Bartell Drug Co.* (W.D.Wash. 2001) 141 F.Supp.2d 1266, 1270-1272; but cf. *Glaubach v. Regence Blueshield* (Wash. 2003) 74 P.3d 115, 116-119 [holding that a Washington statute requiring insurers to provide coverage regardless of sex does not mandate coverage of prescription contraceptives].) Certainly the

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[20] At least 19 other states have adopted laws requiring that employers or insurers provide coverage for prescription contraceptives. (See Note, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives* (2002) 82 Boston U. L.Rev. 1289, 1290, 1298-1301; Comment, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?* (2002) 69 U. Chicago L.Rev. 1867, 1877, fn. 68.)

interest in eradicating gender discrimination is compelling. We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution (art. I, § 7(a)) and triggers the highest level of scrutiny. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17-20.)

Strongly enhancing the state's interest is the circumstance that any exemption from the WCEA sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits. We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties. The high court in *Wisconsin v. Yoder*, *supra*, 406 U.S. 205, painstakingly limited its holding to avoid endorsing any such result. While concluding that the Amish parents in that case were entitled under the strict scrutiny standard of *Sherbert*, *supra*, 374 U.S. 398, to an exemption from a general law requiring their older children to attend public school, the court emphasized that its conclusion depended on the assumption that no Amish child wished to attend. (*Wisconsin v. Yoder*, *supra*, at pp. 230-232.) Similarly, in rejecting a religious employer's challenge to a law requiring him to pay Social Security and unemployment taxes for his employees, the court wrote that "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." (*United States v. Lee*, *supra*, 455 U.S. 252, 261.) "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on

the statutory schemes which are binding on others in that activity." (*Ibid.*; cf. *Tony and Susan Alamo Foundation v. Sec'y of Labor*, *supra*, 471 U.S. 290, 303-306 [religious organization must comply with federal minimum wage laws]; *Dole v. Shenandoah Baptist Church* (4th Cir. 1990) 899 F.2d 1389, 1393-1400 [religious school must comply with federal law requiring equal pay for men and women].) We see no reason why a different rule should apply when a nonprofit corporation enters the general labor market.

Nor are any less restrictive (or more narrowly tailored) means readily available for achieving the state's interest in eliminating gender discrimination. Any broader exemption increases the number of women affected by discrimination in the provision of health care benefits. Catholic Charities argues the Legislature could more widely exempt employers from the WCEA without increasing the number of affected women by mandating public funding of prescription contraceptives for the employees of exempted employers. The Legislature included such a provision in an earlier version of the WCEA (Assem. Bill No. 1112 (1997-1998 Reg. Sess.)), which the Governor vetoed. But Catholic Charities points to no authority requiring the state to subsidize private religious practices. (Cf. *Lyng v. Northwest Indian Cemetery Prot. Assn.*, *supra*, 485 U.S. 439, 447-453 [government need not forgo road building or timber harvesting on its own property to avoid interference with Native American religious practices].)

Catholic Charities next argues the WCEA is underinclusive, and therefore not narrowly tailored, because it does not facilitate access to prescription contraceptives for "indigent women, unemployed women, stay-at-home mothers, women whose employers do not offer health insurance benefits, and women in part-time employment [who] do not qualify for health benefits." But this argument misconceives the principal purpose of the WCEA, which is

not to facilitate access to contraceptives but to eliminate a form of gender discrimination in the provision of health benefits. The situations Catholic Charities identifies, in which no employer or insurer is providing health benefits, do not entail such discrimination.

Finally on this point, Catholic Charities argues the WCEA is not narrowly tailored because it is *overinclusive*. Catholic Charities justifies this surprising assertion by arguing that the law must be overinclusive if it applies to employers that do not discriminate on the basis of gender, and that Catholic Charities does not discriminate on that basis because it does not provide contraceptive coverage to women or to men (e.g., vasectomies). With this argument, however, Catholic Charities merely restates its disagreement with the Legislature's determination that the exclusion of prescription contraceptives from health care plans constitutes a form of gender discrimination. As we have already explained, the Legislature was entitled to reach that conclusion.

For these reasons, applying the strict scrutiny test of *Sherbert*, *supra*, 374 U.S. 398, to Catholic Charities' claim against the WCEA under the free exercise clause of the state Constitution, we find the WCEA meets that test. We do not hold that the state free exercise clause requires courts to apply the *Sherbert* test to neutral, generally applicable laws that incidentally burden religious practice. Instead, as explained above, we leave that question for another day.

C. Rational Basis

Catholic Charities' final challenge to the WCEA is that it violates the rational basis test. More specifically, Catholic Charities argues the State has defined the exempt category of "religious employer" (Health & Saf. Code, § 1367.25, subd. (b)) with arbitrary criteria. "In effect," according to Catholic Charities, "the Legislature decided that

any religious institution that employs individuals of other faiths or that ministers to persons of all faiths (or no faith)—in effect any 'missionary' church or church with social outreach—is not sufficiently 'religious' to qualify for exemption," and that these classifications are "wholly unrelated to any legitimate state interest."

The argument lacks merit. The WCEA's exemption for religious organizations, even if not applicable to Catholic Charities, rationally serves the legitimate interest of complying with the rule barring interference with the relationship between a church and its ministers. (See *ante*, at p. 11 et seq.) Although the high court has not spoken on the subject, the lower federal courts have held that the constitutionally based ministerial exemption survives the decision in *Smith*, *supra*, 494 U.S. 872. (See, e.g., *Gellington v. Christian Methodist Episcopal Church, Inc.*, *supra*, 203 F.3d 1299, 1302-1304; *Combs v. Cen Tx Ann Conf United Methodist Church*, *supra*, 173 F.3d 343, 347-350; *E.E.O.C. v. Catholic University of America*, *supra*, 83 F.3d 455, 460-463; cf. *Schmoll v. Chapman University*, *supra*, 70 Cal.App.4th 1434, 1438-1445 [recognizing a ministerial exception to state employment laws].) Most organizations entitled to invoke the ministerial exemption will be involved in the "inculcation of religious values," which the first criterion requires. (Health & Saf. Code, § 1367.25, subd. (b)(1)(A).) Many will also satisfy the WCEA's fourth exemption criterion, which requires that a religious employer qualify for federal tax exemption as a church, an integrated auxiliary of a church, a convention or association of churches, or a religious order. (See 26 U.S.C. § 6033(a)(2)(A)(i) and (iii), cited in Health & Saf. Code, § 1367.25, subd. (b)(1)(D).) If in any case the constitutionally required ministerial exception were broader than the statutory exemption, the former would of course take precedence.

The second criterion, to which Catholic Charities specifically objects as lacking a rational basis, requires that an employer "primarily employ[] persons who share the religious tenets of the entity." (Health & Saf. Code, § 1367.25, subd. (b)(1)(B).) This provision, in effect, accommodates religious employers more broadly than the ministerial exemption requires by extending the WCEA's exemption to employees who could not fall within the ministerial exemption. The provision has the legitimate, rational purpose of accommodating a state-imposed burden on religious exercise. (*Amos*, *supra*, 483 U.S. 327, 334-335.)

The third criterion, to which Catholic Charities also objects, is problematic. To qualify under it, an employer must "serve[] primarily persons who share the religious tenets of the entity." (Health & Saf. Code, § 1367.25, subd. (b)(1)(C).) To imagine a legitimate purpose for such a requirement is difficult. Reading the provision literally, a hypothetical soup kitchen run entirely by the ministers of a church, which inculcates religious values to those who come to eat (thus satisfying the first, second, and fourth criteria), would lose its claim to an exemption from the WCEA if it chose to serve the hungry without discrimination instead of serving co-religionists only. The Legislature may wish to address this problem. Catholic Charities, however, cannot successfully challenge the WCEA on this ground because the organization concedes it does not qualify under any of the criteria for exemption, including the relatively objective terms of the federal tax statute cited in the fourth criterion. (Health & Saf. Code, § 1367.25, subd. (b)(1)(D).) Catholic Charities thus cannot qualify for exemption in any event.

III. Disposition

The decision of the Court of Appeal is affirmed.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

CHIN, J.

MORENO, J.

CONCURRING OPINION BY KENNARD, J.

In September 1999, the Legislature enacted the Women's Contraception Equity Act (WCEA). Under this law, every group health care policy that "provides coverage for outpatient prescription drug benefits" must, as of January 1, 2000, include coverage for contraceptives. (Health & Saf. Code, § 1367.25.)[1] Exempt from the WCEA are policies sold to entities that are religious employers. To fall within the act's definition of "religious employer," each of these four requirements must be satisfied:

"(A) The inculcation of religious values is the purpose of the entity.

"(B) The entity primarily employs persons who share the religious tenets of the entity.

"(C) The entity serves primarily persons who share the religious tenets of the entity.

"(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended." (§ 1367.25, subd. (b)(1).)

Plaintiff Catholic Charities of Sacramento (Catholic Charities), which has brought this lawsuit challenging the constitutionality of the religious employer exemption, acknowledges that it does not satisfy any of the four requirements for that exemption. Catholic Charities' complaint alleges that it is a nonprofit public benefit corporation "operated in connection with the Roman Catholic Bishop of Sacramento" as "an organ of the Roman Catholic Church." The complaint further alleges that Catholic Charities' mission is to perform good works, such as

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[1] Further undesignated statutory references are to the Health and Safety Code.

"providing immigrant resettlement programs, elder care, counseling, food, clothing and affordable housing for the poor and needy, housing and vocational training of the developmentally disabled and the like." According to the complaint, Catholic Charities provided prescription drug coverage to its 183 employees before the WCEA's effective date; for it to continue to do so now would be promoting the use of contraceptives, a sinful practice under Catholic Church doctrine. For the purposes of deciding the legal issues in this case, the majority accepts these allegations as true, as do I.

I agree with the majority that Catholic Charities is properly subject to the WCEA. In the course of its discussion, however, the majority rejects Catholic Charities' argument that the religious employer exemption discriminates against "religious organizations . . . that engage in charitable work, as opposed to work that is purely spiritual or evangelical." (Maj. opn., *ante*, at p. 24.) I am not persuaded that the first requirement of the religious employer exemption, limiting the exemption to entities whose primary purpose is the "inculcation of religious values" (§ 1367.25, subd. (b)(1)(A)), can be reconciled with the establishment clauses of the federal and state Constitutions. This is a close and difficult issue. I need not resolve it, however, because Catholic Charities does not meet the exemption's fourth requirement that it is a religious entity exempt from federal tax filing, a requirement that both the majority and I agree is constitutional.

I.

The United States Constitution's First Amendment provides that "Congress shall make no law respecting an establishment of religion." (U.S. Const., 1st Amend.) This provision applies to the states through the Fourteenth Amendment; thus, state governments too are prohibited from making such laws. Like its federal counterpart, California's

Constitution provides that the Legislature "shall make no law respecting an establishment of religion." (Cal. Const., art. I, § 4.) Laws that prefer one religion or religious organization over another (often called "denominational preferences") violate these provisions. (See *Epperson v. Arkansas* (1968) 393 U.S. 97, 106 ["State may not adopt programs or practices . . . which 'aid or oppose' any religion."]; *Everson v. Board of Education* (1947) 330 U.S. 1, 15 [no state can "pass laws which aid one religion" or that "prefer one religion over another"].)

On this basis, the United States Supreme Court in *Larson v. Valente* (1982) 456 U.S. 228 invalidated a Minnesota law that treated religious organizations differently. The law in question generally required charitable organizations that solicited contributions to register with the state and to disclose their income and its sources, as well as costs of management, fundraising, and public education. Exempt from this law were religious organizations that received more than 50 percent of their charitable contributions from their own members or affiliates, rather than from the general public. Not exempt were religious organizations such as the Holy Spirit Associations for the Unification of World Christianity (Unification Church) that received more than half of their charitable contributions from " 'door-to-door and public-place proselytizing and solicitation of funds,' " a practice emphasized by the tenets of that religion. (*Id.* at p. 234.) Unification Church members sued, seeking exemption from the law. The federal district court granted the plaintiffs a preliminary injunction, which was affirmed on appeal. The United States Supreme Court, in turn, agreed that the law impermissibly "impose[d] the registration and reporting requirements . . . on some religious organizations but not on others"; it thus, did "not operate evenhandedly," but instead, "effect[ed] the *selective* legislative imposition of burdens and advantages upon particular denominations." (*Id.* at pp. 253-254.)

Catholic Charities argues here that the WCEA's religious employer exemption similarly imposes its burdens and advantages on some religious organizations but not others. Catholic Charities points out that the exemption favors those religious organizations whose purpose is "[t]he inculcation of religious values" (§ 1367.25, subd. (b)(1)(A)), while disfavoring those entities, such as Catholic Charities, whose purpose is to perform good works. Comparing the WCEA to the Minnesota law struck down by the high court in *Larson v. Valente*, *supra*, 456 U.S. 228, 253, which "impose[d] the registrative and reporting requirements on some religious organizations but not on others," Catholic Charities argues that similarly here the WCEA imposes the contraceptive insurance coverage on some religious organizations but not on others.

To distinguish the WCEA's religious employer exemption from the religious organization charitable reporting exemption invalidated in *Larson v. Valente*, *supra*, 456 U.S. 228, the majority states: "The WCEA confers the special benefit of exemption only on those religious organizations whose tenets are opposed to prescription contraceptives and that meet the other requirements for exemption. . . . Those Catholic employers that do not qualify for exemption *are treated precisely the same as* all other employers in the state, whether religious or nonreligious." (Maj. opn., *ante*, at p. 25, italics added.) But the Minnesota charitable solicitation registration law struck down in *Larson v. Valente* treated religious organizations not qualifying for its exemption "precisely the same as" nonreligious charitable solicitors and other nonqualifying religious solicitors. Thus, in treating religious entities that do not qualify for its exemption just like nonreligious entities subject to its requirements, the WCEA seems substantially similar to that unconstitutional Minnesota law.

Under the high court's analysis in *Larson v. Valente*, *supra*, 456 U.S. 228, a law that selectively discriminates among religious organizations might still not violate the establishment clause if it is "closely fitted to the furtherance" of a "compelling governmental interest." (*Id.* at p. 255.) As the majority explains, and I agree, the WCEA serves the compelling state interest of eliminating gender discrimination. (Maj. opn., *ante*, at p. 40.) But in upholding the first requirement of the religious employer exemption (limiting it to those religious entities whose purpose is inculcating religious values), the majority does not explain how that limitation is "closely fitted" to the elimination of gender discrimination. I have serious doubts that the First Amendment, as construed by the United States Supreme Court, allows California to limit its religious employer exemption to religious entities that have as their purpose the inculcation of religious values, denying that exemption to religious entities, like Catholic Charities, that are organized for the purpose of feeding the hungry, caring for the sick, and providing shelter to the homeless.[2]

II.

As I noted at the outset, dispositive here is Catholic Charities' concession that it does not meet the fourth requirement for the WCEA's religious employer exemption

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[2] The majority construes *Larson v. Valente*, *supra*, 456 U.S. 228, as prohibiting only those laws that discriminate among religious denominations and thus as having no effect on Catholic Charities, an entity affiliated with the Roman Catholic denomination. (Maj. opn., *ante*, at p. 26, fn. 10.) Even under this view, the first requirement of the WCEA's religious employer exemption is of questionable constitutionality because it disfavors those denominations that have as their primary purpose something other than the inculcation of religious values. Thus any organization or entity established by a religious denomination whose primary purpose was attending to the needy would on that basis be denied the religious employer exemption.

as a religious entity exempt from federal tax filing. (See § 1367.25, subd. (b)(1)(D).) Because the concerns expressed above about the constitutionality of the exemption's first requirement—that "inculcation of religious values" (§ 1367.25, subd. (b)(1)(A)) is the purpose of the entity—can have no effect on the judgment, I agree with the majority that if Catholic Charities is to afford its employees health coverage that would include outpatient prescription drugs, it must do so through a policy that provides coverage for prescription contraceptives.

KENNARD, J.

DISSENTING OPINION BY BROWN, J.

This case presents questions on which reasonable minds can differ—especially in light of the whimsical and somewhat erratic path of free exercise jurisprudence after the Supreme Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith* (1990) 494 U.S. 872 (*Smith*). However, as a court pledged to defend constitutional limits, operating in the post-*Smith* environment, we ought to think very carefully about our role in defining the road ahead. Instead of being dismissive of the very serious claims presented here, we should treat them with the highest respect.

After *Smith*, neutral, generally applicable laws do not have to survive compelling state interest review. Such laws require no justification no matter how severely they burden the individual religious claimant and no matter how inconsequential the government interest. (See *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1195 (conc. & dis. opn. of Kennard, J.) (*Smith v. FEHC*).) It is, however, far from self-evident, if or how, *Smith* applies to laws that directly contravene the religious conduct of religious organizations. The Women's Contraceptive Equity Act (WCEA) attempts to circumvent this potentially substantial hurdle by creating a very narrow exemption for churches. But that begs an even more fundamental question: may the government determine what parts of bona fide religious organizations are religious and what parts are secular? And, in particular, may the government make such distinctions in order to infringe the religious freedom of that portion of the organization the government characterizes as secular? Because, unlike the majority, I do not think *Smith* provides obvious answers to these questions, I respectfully dissent.

I

The proponents of the WCEA make an argument with which no one can disagree. Women in the workplace are entitled to be treated fairly and equitably and to be free from discrimination on the basis of gender. Government has not only the authority, but the obligation, to discourage invidious discrimination in the workplace, and this includes discrimination in the distribution of benefits. (See, e.g., *Erickson v. Bartell Drug Company* (W.D.Wash. 2001) 141 F.Supp.2d 1266, 1271 [title VII, as amended by the Pregnancy Discrimination Act, prevented exclusion of contraception from prescription drug coverage offered by employer]; 42 U.S.C. § 2000e(k) [prohibiting, under title VII, discrimination on the basis of "pregnancy, childbirth, or related medical conditions"]; U.S. EEOC, *Commission Decision* (Dec. 14, 2000) [coverage of contraception] <http://eeoc.gov/policy/docs/decision-contraception.html> [as of Mar. 1, 2004]; Conn. Gen. Stat., § 38a-503e (2001) [mandating insurance coverage of prescription contraception]; Mass. Gen. Laws, ch. 176B, § 4W(b) (2002) [same]; Vt. Stat. Ann., tit. 8, § 4099c (2000) [same].)

Neither the propriety, nor the wisdom of, nor the government's authority to impose a prescription contraceptive mandate on California employers is at issue here. The question is a very narrow one. May the government impose a mandate on a religiously affiliated employer that requires the employer to pay for contraceptives—in violation of an acknowledged religious tenet—or to redefine what constitutes religious conduct?[1] While antidiscrimination laws reflect a

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[1] The question has to be stated in the alternative because the California enactment has some peculiarities. Despite the state's argument that it has a compelling interest in ensuring that all working women who desire prescription contraceptive coverage have that option available, the mandate is imposed only on employers that provide prescription coverage. Thus, Catholic Charities of Sacramento, Inc. (Catholic Charities), can choose either to provide contraceptives or not to provide prescription

constitutional value, religious liberty occupies a commensurate level in the constitutional hierarchy. As often happens with First Amendment cases, this is "a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference." (*Equal Emp. Opp. Comm'n v. The Catholic Univ. of America* (D.C. Cir. 1996) 83 F.3d 455, 460 (*Catholic University*).) Thus, the desire to prevent discrimination cannot be the beginning and the end of the discussion.

A. Why Religious Liberty Is Important

A strong argument can be made that it was the primacy of religious liberty in the early history of this country, with its acknowledgment of the separate spheres of church and state, that gave rise to our notions of limited government and equal protection—the constitutional precursors of our antidiscrimination laws. (McConnell, *Why Is Religious Liberty the "First Freedom"?* (2000) 21 Cardozo L.Rev. 1243, 1244 ["the division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas"].)

Our ability to create a space for religious perspectives is both instrumental and regenerative for democracy. Religious institutions enhance individual autonomy "by challenging the sovereign power of the liberal state"

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coverage to employees at all. This option would arguably make everyone worse off, but, in theory at least, equally so.

(Noonan, *The End of Free Exercise?* (1992) 42 De Paul L.R. 567, 579-580) and by articulating alternative visions—"counter-cultural visions that challenge and push the larger community in . . . directions unimagined by prevailing beliefs." (Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For* (2004) 49 Vill. L.Rev. 77, 156.) By protecting religious groups from gratuitous state interference, we convey broad benefits on individuals and society. By underestimating the transformative potential of religious organizations, we impoverish our political discourse and imperil the foundations of liberal democracy.

B. Does *Smith* Apply to Religious Organizations?

Despite its surface simplicity, *Smith* is not an easy case to understand or apply. The majority correctly quotes the critical passages from *Smith*: " '[T]he right of free exercise does not relieve an *individual* of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." ' (*Smith*, [*supra*, 494 U.S.] at p. 879, quoting *United States v. Lee* [(1982)] 455 U.S. 252, 263, fn. 3 (conc. opn. of Stevens, J.).) To permit religious beliefs to excuse acts contrary to law, the *Smith* court reasoned, ' "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit *every citizen* to become a law unto *himself*. " ' (*Smith*, at p. 879, quoting *Reynolds v. United States* (1879) 98 U.S. 145, 167.)" (Maj. opn., *ante*, at p. 17, italics added.)

Since *Smith* focused exclusively on the individual's free exercise of religion, some courts have reasoned that religious institutions are exempted entirely from the *Smith* analysis. (*Gellington v. Christian Methodist Episcopal Church, Inc.* (11th Cir. 2000) 203 F.3d 1299, 1303; see Kaplan, *The Devil Is in the Details: Neutral, Generally*

Applicable Laws and Exceptions from Smith (2000) 75 N.Y.U. L.Rev. 1045, 1070.)

1. Individuals v. Institutions

This case involves a religious organization and not an individual. Perhaps more importantly, it does not deal with the denial of a benefit because of a violation of existing law. Rather, it attempts to assess the constitutional implications of a law that requires a religious organization to provide a benefit despite its theological objections. These fundamental differences are simply ignored in the majority's analysis.

Under *Smith,* the right of free exercise does not relieve an *individual* of the obligation to comply with a valid and neutral law of general applicability even if the law requires conduct that contravenes a religious belief, but "[i]t does not follow . . . that *Smith* stands for the proposition that a *church* may never be relieved from such an obligation." (*Catholic University*, *supra*, 83 F.3d at p. 462.)

The majority may have made an abortive attempt to deal with this obvious distinction by citing, and dismissing, the so-called ministerial exception. It is true, as the majority notes, that the ministerial exception is not directly at issue here. (See, e.g., *Alicea-Hernandez v. Catholic Bishop of Chicago* (7th Cir. 2003) 320 F.3d 698 [ministerial exception to title VII]; *E.E.O.C. v. Roman Catholic Diocese of Raleigh* (4th Cir. 2000) 213 F.3d 795 [same]; *Combs v. Central Texas Ann. Conf. of United Methodist Church* (5th Cir. 1999) 173 F.3d 343 [same].) Likewise, it is certainly debatable whether the legislative action challenged here invades the narrow domain labeled church autonomy. (See, e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696 [state court impermissibly encroached on church autonomy]; *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94 [state statute impermissibly encroached on church autonomy].)

And yet, the logic of these cases suggests that the constitutionally protected space for religious organizations is actually broader than these obvious categories. In short, the ministerial exception and the church autonomy doctrine are ways of describing spheres of constitutionally required protection, but these categories are not exhaustive.

The court in *Catholic University* summarized the distinction it was making this way: "We conclude from our review of the Supreme Court's First Amendment jurisprudence that whereas the Free Exercise Clause guarantees a church's freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the right of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application." (*Catholic University*, *supra*, 83 F.3d at p. 463.) In fact, the Legislature apparently takes a similar view of the breadth of *Smith* because it provided an exemption from the WCEA for churches.

2. The Two Faces of Entanglement

Under venerable establishment clause precedent, however, the exemption itself is prob'ematic. To put it bluntly, the government may generally separate the religious from the secular to decide how it will dispense its benefits, but it cannot parse a bona fide religious organization into "secular" and "religious" components solely to impose burdens on the secular portion.

As noted, *ante*, the constitutional basis for the distinction seems indisputable. The United States Supreme Court has recognized that government action may burden the free exercise of religion in two different ways: "by interfering with a believer's ability to observe the commands or practices of his faith [citations], and by encroaching on the

ability of a church to manage its internal affairs." (*Catholic University*, *supra*, 83 F.3d at p. 460; see, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 531-533 (*Lukumi*); *Kedroff v. St. Nicholas Cathedral*, *supra*, 344 U.S. at p. 116 [free exercise clause protects power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"].)

If Catholic Charities were a "religious employer" it would be exempt from the WCEA's requirement to include coverage for contraceptives in its group healthcare policy. Under the act, a religious employer must satisfy all of the following criteria: "(A) The inculcation of religious values is the purpose of the entity. [¶] (B) The entity primarily employs persons who share the religious tenets of the entity. [¶] (C) The entity serves primarily persons who share the religious tenets of the entity. [¶] (D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended." (Health & Saf. Code, § 1367.25, subd. (b)(1).)

As the majority notes, "Catholic Charities does not qualify as a 'religious employer' *under the WCEA* because it does not meet any of the definition's four criteria." (Maj. opn., *ante*, at p. 5, italics added.) But Catholic Charities would be a religious employer if the Legislature had not designed the exemption narrowly enough to exclude it.[2] The plaintiffs contend the Legislature has "deliberately defined

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[2] Earlier versions of the WCEA contained a broader conscience clause—which Catholic Charities deemed acceptable—exempting bona fide religious employers and allowing religiously affiliated hospitals, universities, and social service agencies to opt out. The current version of the act exempts churches, synagogues, mosques, temples, missions, parochial schools, seminaries and convents from the requirement to provide contraceptive coverage.

the Catholic Church in a manner entirely inconsistent with Catholic religious teaching, to exclude critical, constitutive elements of the Catholic Church—i.e., the Church's healthcare, social service and educational ministries—from the definition of 'religious employer' included in the exemption provisions."

The high court " 'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' " (*Corporation of the Presiding Bishop v. Amos* (1987) 483 U.S. 327, 334 (*Amos*).) At the same time, acknowledging that churches often regard the community services provided by affiliated nonprofits as "a means of fulfilling religious duty and providing an example of the way of life a church seeks to foster" (*id.* at p. 344 (conc. opn. of Brennan, J.)), the court concluded the case-by-case determination of whether an affiliated nonprofit is religious or secular is inappropriate under the free exercise clause. (*Id.* at pp. 341-342 (conc. opn. of Brennan, J.) ["Religion includes important communal elements for most believers. They exercise their religion through religious organizations and these organizations must be protected by the [Free Exercise] Clause. . . . [R]eligious activity derives meaning in large measure from participation in a larger religious community"].)

Even after *Smith*, it seems quite clear the government may not discriminate among religions (*Larson v. Valente* (1982) 456 U.S. 228, 253) or engender a risk of politicizing religion (*id.* at pp. 253-254) or purport to exempt "religious" but not "secular" activities (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 301; *Espinosa v. Rusk* (10th Cir. 1980) 643 F.2d 477, 480-481, affd. (1982) 456 U.S. 951). In *National Labor Relations Board v. The Catholic Bishop of Chicago* (1979) 440

U.S. 490 (*Catholic Bishop*), the National Labor Relations Board (NLRB) certified unions as bargaining agents for lay teachers in church-affiliated schools. The NLRB asserted it was required to decline jurisdiction only when schools were " 'completely religious' " and not just " 'religiously associated.' " (*Id.* at p. 493.) The Seventh Circuit Court of Appeals rejected the NLRB's standard as a " 'simplistic black or white, purported rule' " which offered no guide to discretion. (*Id.* at p. 495.) " 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools.' " (*Id.* at p. 496.) The Supreme Court, after acknowledging that the NLRB's attempt to distinguish between " 'completely religious' " and " 'religiously associated' " was a recognition of its intrusion into areas protected by the religion clauses, construed the National Labor Relations Act so as to avoid deciding whether jurisdiction "was constitutionally permissible under the Religion Clauses of the First Amendment." (*Catholic Bishop*, at p. 499.) Nevertheless, the court expressed concern that NLRB jurisdiction would inevitably involve "inquiry into the good faith of the position asserted by clergy-administrators and its relationship to the school's religious mission," and the "very process of inquiry" would impinge on rights guaranteed by the religion clauses. (*Catholic Bishop*, at p. 502.)

In *Universidad Central de Bayamon v. NLRB* (1st Cir. 1985) 793 F.2d 383, 387, the NLRB sought to avoid the problem by exempting " 'pervasively sectarian' " schools. The controlling opinion in *Universidad Central de Bayamon* found board jurisdiction posed just as great a risk as the Supreme Court envisioned in *Catholic Bishop*, *supra*, 440 U.S. 490. "For the Board to exercise jurisdiction over an educational institution where 'the inculcation of religious values is at least *one* purpose of the institution' and 'to promise that courts in the future will control the Board's efforts to examine religious matters, is to tread the path that

Catholic Bishop forecloses.' " (*Univ. of Great Falls v. NLRB* (D.C. Cir. 2002) 278 F.3d 1335, 1342 (*Great Falls*), quoting *Universidad Central de Bayamon v. NLRB*, at p. 402.)

In *Great Falls*, the Court of Appeals for the District of Columbia rejected the NLRB's latest effort—the "substantial religious character" test—because the multifaceted analysis created the same concerns as the approach rejected in *Catholic Bishop*. Moreover, the court invoked a long line of precedents which have made it clear that religious tests, inquiries into religious perspectives, or generally trolling through a person's or institution's religious beliefs is " 'not only unnecessary but also offensive.' " (*Great Falls*, *supra*, 278 F.3d at pp. 1341-1342, quoting *Mitchell v. Helms* (2000) 530 U.S. 793, 828; *Amos*, *supra*, 483 U.S. 327, 340, 345 (conc. opn. of Brennan, J.).)

The court in *Great Falls* thus suggested a broad exemption which would avoid the pitfalls of having the government determine what is religious or how much religion is sufficient. The court would exempt any school which purports to provide a religious environment; is organized as a nonprofit; and affiliated with, or owned, or operated, or controlled directly or indirectly by a recognized religious organization or entity whose membership is determined at least in part with reference to religion. (*Great Falls*, *supra*, 278 F.3d at p. 1343.) The point of this bright-line test was to avoid delving into religious doctrine or motive and to avoid coercing a religiously affiliated educational institution to alter its religious mission to meet regulatory demands. (*Id.* at p. 1345.) This approach responds to a longstanding concern that the religious liberty protected by the Constitution ought not to depend on a "determination by state authority as to what is a religious cause." (*Cantwell v. State of Connecticut*, *supra*, 310 U.S. at p. 307.)

Of course, the cited cases are distinguishable. The controversy here does not involve solicitation, or potential chilling effects, religious schools, administrative discretion, or ad hoc determinations. In reality, this case is worse. Here we are dealing with an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission. The government is not accidentally or incidentally interfering with religious practice; it is doing so willfully by making a judgment about what is or is not religious. This is precisely the sort of behavior that has been condemned in every other context. The conduct is hardly less offensive because it is codified. Definition may be just as pernicious as ongoing monitoring if its purpose is to suppress or burden religious conduct. (*Espinosa v. Rusk*, *supra*, 634 F.2d at p. 481 ["The conception of religion entertained by the City . . . was that it had to be purely spiritual or evangelical. Thus, the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was deemed subject to regulation. This broad definition of secular is part of the problem"].)

3. The Meaning of Neutrality

In theory, when religious liberties are at stake, the state is only neutral when it does not choose sides. (Laycock, *Religious Liberty as Liberty* (1996) 7 J. Contemp. Legal Issues 313 ["[T]he core point of religious liberty is that the government does not take positions on religious questions—not in its daily administration, not in its laws, and not in its Constitution either"].) This would mean that the state may not prefer or seek to impose a particular normative view by squelching a competing religious perspective. Genuine neutrality would "allow many different and contending voices to be represented in public discourse." (McConnell, *Why Is Religious Liberty the "First Freedom"?*, *supra*, 21 Cardozo L.Rev. at p. 1262.)

In the present controversy, one side posits that sex is an aspect of autonomy, a vital human function in which men and women should be able to engage, enjoying their sexuality "free from anxiety." (Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control* (1999) 13 J.L. & Health 171, 181.) This may in fact be the view of a majority of American adults. The Catholic Church's view, in contrast, deems all forms of nonmarital sex immoral, and views sex within marriage as a unitive, procreative, and sacred reflection of a spiritual, emotional, and biological reality that comes complete with reproductive anxiety. (See George & Bradley, *Marriage and the Liberal Imagination* (1995) 84 Geo. L.J. 301-320.) This is a perspective many people would disparage as archaic. Several of the legislators debating the WCEA seemed to think so.[3]

The Catholic Church purports to be one of those different and contending voices, a church which "has never envisioned a sharp divide between the Church and the world, the spiritual and the temporal, or religion and politics. For the Church, the internal spiritual life of its members and institutions must always move outward as a sign and instrument for the transformation of the larger society." (Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, *supra*, 49 Vill. L.Rev. at p. 157.)

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[3] (See, e.g., Remarks of Sen. Speier, Sen. Floor Debate on Sen. Bill No. 41 (1999-2000 Reg. Sess.) Apr. 12, 1999, pp. 7-8 [floor statement of Senator Speier asserting that since 75 percent of all California Catholic hospitals already provide contraception coverage, the "issue has already been resolved . . . and its time has come"]; Remarks of Sen. Speier, Sen. Floor Debate on Assem. Bill No. 39 (1999-2000 Reg. Sess.) Sept. 7, 1999, p. 7 [floor statement of Senator Speier arguing that "59 percent of all Catholic women of childbearing age practice contraception [and] 88 percent of Catholics believe . . . that someone who practices artificial birth control can still be a good Catholic," and commenting, "I agree with that. I think it's time to do the *right thing*" (italics added)].)

Petitioner complains the narrow exemption was designed to lend the state's "considerable weight to the dissenting side of a conflict within the church about the legitimacy of contraceptive practice—under the banner of protecting the 'rights' of those who disagree . . . and to deny the church exemption based on the allegedly unpopular nature of a church doctrine that diverges from contemporary cultural mores." In petitioner's words, the state's "action has the effect of declaring the Catholic hierarchy's stand 'heresy' in the eyes of secular culture."

Of course, practice always diverges from theory. In contemporary American society, the government does take sides on policy issues. The First Amendment precludes the government from taking sides if the dispute involves internal church governance, but that leaves an area of overlap where the religiously dictated conduct of churches operating in the world comes into conflict with public policy. The question then is whether the coercive force of the law may be brought to bear to compel a religious organization that holds an alternative view, based on religious scruples, to support a hostile and competing vision of the good.

a. Religious bigotry

Smith could be read, as the majority apparently reads it, to suggest that religion is not entitled to constitutional protection unless the government action expressly and specifically targets religious expression. Under this interpretation, protection for religious liberty requires proof of religious bigotry, i.e., proof that government officials acted out of anti-religious motives. Thus, *Smith*—even as modified by *Lukumi*—would prohibit infringements of religious liberties only if a statute has the "object or purpose of . . . suppress[ing] religion or religious conduct" or involves "[o]fficial action that targets religious conduct for distinctive treatment." (*Lukumi*, *supra*, 508 U.S. at pp. 533-534.) Since

this statute imposes a mandate on all employers that provide prescription coverage, it arguably does not target religious conduct. On one level, religious interests and secular interests are treated with equal dignity, and since the mandate provides an escape hatch, Catholic Charities' attempt to claim specifically unequal treatment faces formidable obstacles. Consequently, the majority finds Catholic Charities has failed to prove an anti-religious motive and the statute is neutral.

b. Objects and effect

There is, however, more than one way to look at neutrality. As *Lukumi* explains it, "[f]acial neutrality is not determinative. . . . The [free exercise] clause 'forbids subtle departures from neutrality' [citation] and 'covert suppression of particular religious beliefs.' " (*Lukumi*, *supra*, 508 U.S. at p. 543.) "Apart from the text, the effect of a law in its real operation is strong evidence of its object." (*Id.* at p. 535.) "[I]f the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral [citation]; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (*Id.* at p. 533.) "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.' " (*Lukumi*, at p. 543.) But equality in the context of religious liberty must be broadly defined. In effect, the general applicability requirement is needed to ensure neutrality across broad categories of regulation. Pursuant to *Lukumi*, if other activities which cause comparable harm to the same governmental interests are not regulated, the law is not generally applicable. Thus, *Lukumi* makes it clear that strict scrutiny is required if a law is not neutral—and it considers the question of neutrality broadly.

In this case, for instance, defendants argue that Catholic Charities' ability to opt out, i.e., to choose not to provide any prescription coverage, obviates any concern

about infringement. Catholic Charities insists it should not be forced to relinquish its vision of appropriate employee relations to preserve its right to object to the use of contraceptives. From the Church's perspective, to demand that contraception be funded, despite bona fide religious objections, is to take sides, to abandon the commitment to public neutrality. In this sense, the WCEA, with its grudging religious exemption, may not be neutral. The majority's response that the WCEA's narrow exemption is an accommodation and not an imposition seems entirely unresponsive.

In the whole scheme of things, the risk associated with allowing government to impose a stifling orthodoxy in pursuit of the good society may greatly outweigh the small harm of tolerating heterodoxy in this circumstance.[4]

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[4] This does not mean that the government may never limit what religious organizations can do. There are truly neutral laws which may be applied; there are aggressive interventions which are necessary to prevent harm. (See, e.g., *Walker v. Superior Court* (1988) 47 Cal.3d 112, 139 [finding Christian Scientist who did not seek medical treatment for her child liable for child's death, notwithstanding the "religious infringement of significant dimensions," since state's interest is compelling and child endangerment statute is narrowly tailored]; Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, *supra*, 49 Vill. L.Rev. at p. 161 ["In rare cases, limitations on the freedom of religious organizations may be necessary. For example, if a religious group experiments with practices that endanger the lives of its employees or threaten them with serious bodily injury, interference may be justified"]; Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy* (1981) 81 Colum. L.Rev. 1373, 1406 ["Courts have intervened to protect church members from serious bodily harm even when they voluntarily submitted"].) In contrast, what this case presents is essentially a clash of ideas.

At oral argument, counsel indicated the Catholic Church, including Catholic Charities, employs fewer than 60,000 of California's millions of employees.[5] Some of the Church's employees belong to religious orders and are presumably fully in agreement with the church's position. Some are men, some are women no longer capable of childbearing, and some are spouses of people employed by other companies who are covered by their spouses' health plans. Of the women of childbearing age who remain, and to whom contraceptive coverage is a critical concern, none are faced with a pervasive practice which would prevent them from finding more congenial employment.[6] The existence of WCEA's

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[5] These numbers are approximate. At oral argument, Catholic Charities counsel asserted that the Catholic Church employs fewer than 50,000 people, including those in holy orders. Proponents claim there are 52,000 employees in Catholic-affiliated hospitals alone. Using 60,000 as a point of reference, it appears all Catholic Church employees in California represent less than .5 percent of the California workforce, and female employees of the Catholic Church represent about the same percentage of the number of working women of childbearing age in California. According to recent Bureau of Labor Statistics publications, the current number of California adults employed in nonfarm jobs is approximately 14.4 million. (Bur. of Lab. Statistics, U.S. Dept. of Lab. News Release No. 04-81 (Jan. 27, 2004) Employees on nonfarm payrolls by state and selected industry sector, table 5<http://www.bls.gov/

news.release/pdf/laus.pdf> [as of Mar. 1, 2004].) A little less than half are women. Extrapolating from national statistics, around 5 million of that total will be women between 16 and 45. (Bur. of Lab. Statistics, U.S. Dept. of Lab. News Release No. 04-120 (Feb. 6, 2004) Selected employment indicators, table A-6 <http://www.bls.gov/

newsrelease/pdf/empsit.pdf> [as of Mar. 1, 2004].) Even assuming these numbers need to be adjusted upward or downward for accuracy, an exemption for Catholic Charities would seem to have a negligible effect.

[6] The majority cites language from *United States v. Lee*, *supra*, 455 U.S. 252, for the proposition that allowing an employer to be exempt from a neutral law "operates to impose the employer's religious faith on employees." (*Id.* at p. 261.) This is a curious statement. In *Lee*, both the

mandate—to which the vast majority of California employers apparently have no religious objection—enhances their employment options. In fact, the defection of talented female employees may cause Catholic Charities to reconsider its position. Such a result has no First Amendment implications.

A substantial amount of federal case law supports Catholic Charities' claim that the Legislature's attempt to draw distinctions between the religious and secular activities of a single religious entity is an impermissible government entanglement in religion. I am inclined to agree. Such an action is constitutionally invalid and that ends the discussion. If, however, the existence of the narrow exemption simply shows the statutory scheme is not neutral in operation or effect, it is invalid only if it fails strict scrutiny.

C. Strict Scrutiny

Strict scrutiny is not what it once was. Described in the past as "strict in theory and fatal in fact" (Gunther,

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employer and the employee were members of the Old Order Amish and all agreed they should be exempt from Social Security and unemployment insurance taxes. Even if that were not the case, it is not clear how an employer is in a position to impose anything on its employees to which they object. (U.S. Const., 13th Amend. [prohibiting slavery or involuntary servitude].) Only the state, which holds the monopoly on coercive force, can compel adults to remain where they do not choose to be and do what they do not wish to do.

In *Smith v. FEHC*, *supra*, 12 Cal.4th 1143, this court considered whether a state law prohibiting discrimination against unmarried cohabitating couples burdened the free exercise of a landlady who objected to renting to the couple on religious grounds. A majority of the court concluded Smith's rights were not substantially burdened because she could simply abandon the rental business and redeploy her capital. If we reject the challenges of some religious claimants because they have other options, what logic compels us to assume that employees have no choice?

Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection (1972) 86 Harv. L.Rev. 1, 8), it has mellowed in recent decades (see, e.g., *Grutter v. Bollinger* (2003) 539 U.S. 306 [123 S.Ct. 2325, 2338] [holding state law school's race-based affirmative action program survived strict scrutiny and noting that "[s]trict scrutiny is not 'strict in theory, but fatal in fact' "]).

If recent precedent is any guide, a state's interest is compelling if the state says it is. Thus, consistent with federal precedent compelling interest now seems more or less coextensive with the state's asserted exercise of police power.

1. Compelling State Interest

Unquestionably, the desire to eradicate invidious discrimination is a compelling state interest. But is the desire to force conformity on a single employer that objects to contraception on religious grounds also a compelling state interest? In the latter case, the state is not dealing with invidious discrimination; it is trying to prevent a disparate impact. Catholic Charities does not discriminate because of an animus against women. It opposes all forms of birth control, except abstinence, whether for men or women, whether prescription or over-the-counter, whether surgical, oral, or mechanical.

2. Narrow Tailoring

The WCEA defines as religious only those organizations for which the inculcation of religious values is the sole purpose of the entity, that primarily employ only adherents of their own faith tradition, that primarily serve only people who share their religious tenets, and that qualify as nonprofit organizations described in section 6033(a)(2)(A)i or iii of the Internal Revenue Code of 1986.

This is such a crabbed and constricted view of religion that it would define the ministry of Jesus Christ as a secular activity.[7] The stinginess of the exemption makes the structure of the act all the more baffling. The mandate applies only to employers that provide prescription coverage. Thus, Catholic Charities can avoid the mandate by dropping the coverage. The state wants to make sure that women are not burdened more than others. Where employers cooperate, the WCEA will reduce the inequitable financial burden of healthcare for women. If religiously affiliated employers are serious about their objections, however, women who work for those employers could actually be worse off.

The only reasons given for narrowing the exemption so drastically is the alleged concern that the exception could "swallow up" the rule because the numbers of employees who work for *secular organizations* affiliated with religious entities could easily approach several hundred thousand; the exemption might deprive thousands of employees of access to nondiscriminatory health and disability insurance; and a desire exists to extend coverage to as many people as possible. There are a few problems with this litany. First, the act, as its structure demonstrates and as the majority candidly admits, has nothing to do with access or extending coverage. "[T]he principal purpose of the WCEA . . . is not to facilitate access to contraceptives but to eliminate a form of gender

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[7] Even churches that do not operate schools, hospitals, or social service agencies would have trouble with the WCEA's religious test. Not all religions proselytize. Those that do necessarily reach out to people who do not share their beliefs. Christian denominations, for example, are commanded to seek and save the lost. "Go ye into all the world and teach the gospel to every creature." (Mark 15:15.) Catholic Charities suggest that some Catholic congregations might be "ineligible for the exemption depending . . . upon the demographics of a particular diocese, the fortuitous nature of hiring patterns, and the particular application of the theological criteria . . . ."

discrimination in the provision of health benefits." (Maj. opn., *ante*, at pp. 43-44.) Moreover, the record provides no support for the claim that the exemption potentially affects several hundred thousand employees.

Furthermore, employers have the option of self-insuring. The Employee Retirement Income Security Act preempts state regulation of self-insured companies and "prohibits states from mandating benefits or defining discrimination in self-insured employee benefit plans more broadly than federal law." (Law, *Sex Discrimination and Insurance for Contraception* (1998) 73 Wash. L.Rev. 363, 395; 29 U.S.C. § 1001 et seq.) Such employers would not only not be subject to mandatory prescription coverage, they would not be subject to *any* of California's more restrictive insurance regulations. Arguably, the existence of these secular exemptions supports a religiously-affiliated-employer exemption even under *Smith*. The state would also need to show its refusal to countenance a religious exception, in a regulatory arena rife with exceptions, is not "official action that targets religious conduct for distinctive treatment." (*Lukumi*, *supra*, 508 U.S. at pp. 533-534.)

II.

Thus, whether the WCEA would survive strict scrutiny—even under the relaxed federal standard—seems a much closer question than the majority acknowledges. But there may be other good reasons to rely on independent state grounds. Changes in the interpretation of the federal charter are not only becoming more frequent, the balancing test, and the standards applied to them, are shifting. Instead of applying *Smith*, we might view it as effectively returning free exercise questions to the states.

A. A Document of Independent Force

"We may take it for granted that the meaning of California Constitution article I, section 4, . . . is not dependent on the meaning of any provision of the federal Constitution. The state charter declares in so many words that '[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.' (Cal. Const., art. I, § 24.)" (*Smith v. FEHC*, *supra*, 12 Cal.4th at p. 1177.) "Respect for our Constitution as 'a document of independent force' [citation] forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter." (*People v. Pettingill* (1978) 21 Cal.3d 231, 248, quoting *People v. Brisendine* (1975) 13 Cal.3d 528, 549-550.)

This is true even when the language is identical to the federal Constitution, but is particularly true when the language differs. (See, e.g., *Golden Gateway Center v. Golden Gateway Tenants Assn.* (2001) 26 Cal.4th 1013, 1019 ["Unlike the United States Constitution, which couches the right to free speech as a limit on congressional power (see U.S. Const., 1st Amend.), the California Constitution gives '[e]very person' an affirmative right to free speech. [Citation.] Accordingly, we have held that our free speech clause is 'more definitive and inclusive than the First Amendment' " (fn. omitted)].)

Similarly, although we have said California's establishment clause is coextensive with the federal provision (*East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 718), California's free exercise clause *guarantees* "free exercise and enjoyment of religion without discrimination or preference" and specifies that "liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the state." (Cal. Const., art. I, § 4.) We do not have to decide

that this language literally embodies the strict scrutiny test. The drafting history of California's free exercise clause is not clear enough to resolve the question definitively. Although the proponents of the licentious acts clause may simply have wanted to preserve the ability of the state to regulate specific practices they considered immoral or dangerous (Browne, Rep. of the Debates in Convention of Cal. on Formation of State Const. (1850) p. 39), that does not mean they thought the language was otherwise synonymous with the language of the federal Constitution.

B. The Compelling State Interest Analysis

The majority carefully avoids deciding whether strict scrutiny would be required under the California Constitution. Other states with very similar constitutional liberty of conscience clauses have found that infringement requires strict scrutiny. (See, e.g., *Humphrey v. Lane* (Ohio 2000) 728 N.E.2d 1039, 1043 [holding that under the Ohio Constitution, "the standard for reviewing a generally applicable, religion-neutral state regulation that allegedly violates a person's right to free exercise of religion is whether the regulation serves a compelling state interest and is the least restrictive means of furthering that interest" and finding the regulation at bar not the least restrictive]; *State v. Hershberger* (Minn. 1990) 462 N.W.2d 393 [under the Minnesota Constitution, neutral motor vehicle statute, which burdened Amish religious exercise, failed compelling state interest test since state failed to show lack of reasonable alternative means]; *First Covenant Church v. City of Seattle* (Wash. 1992) 840 P.2d 174, 187 [statute that burdened free exercise failed state compelling interest test under Washington Constitution since the state's interest was not of sufficient magnitude to outweigh free exercise of religion].)

At the very least, the constitutional weight of the state's interest must be affected by the size and severity of the

problem the state is attempting to solve. To authorize the state to use a howitzer to smite a gnat should be no part of our constitutional jurisprudence. Where strict scrutiny applies, the state "may abridge religious practices only upon a demonstration that some compelling state interest *outweighs* the defendants' interests in religious freedom." (*People v. Woody* (1964) 61 Cal.2d 716, 718 (*Woody*).)

It may also be true that "[s]ection 4 has not played an independent role in free exercise claims" (Grodin et al., The Cal. State Constitution: A Reference Guide (1993) p. 44), but does that mean it should remain dormant? In *Woody*, the court relied on the First Amendment rather than the California provision, but in doing so, the court applied strict scrutiny and insisted on a searching inquiry. Under California law—at least up to now—the compelling state interest test had bite and required the court to "weigh[] the competing values represented . . . on the symbolic scale of constitutionality." (*Woody*, *supra*, 61 Cal.2d at p. 727.) Untested assertions of a possible deleterious effect on a statutory scheme were not sufficient. (*Id.* at p. 724.) In *Woody*, the court concluded that uniform enforcement of neutral criminal drug laws (similar to the laws at issue in *Smith*) was not a compelling reason to intrude upon sincere religious practices. In explaining why the interest in drug enforcement—while undeniably important—was not compelling enough, the court said: "In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty." (*Woody*, at p. 727.) These concerns should be heightened when the government seeks to redefine the core theology of religious organizations.

Under the standard enunciated in *Woody*, the state has actually failed to meet its burden. The whole debate ensues

because the state found that "approximately 10 percent of commercially insured Californians do not have coverage for prescription contraceptives." (Maj. opn., *ante*, at p. 2.) Presumably that 10 percent includes both men and women. Still, it means that 90 percent of Californians who are commercially insured do have such coverage! The insurance gap itself is not large, and Catholic Church employers can constitute only a small percentage of that small percentage.

Moreover, even if we assume the interests at issue here are both compelling and of equal weight, the Legislature's refusal to grant a broader exemption—one which would not embroil the government in the unseemly task of deciding what is "religious"—is inexplicable. The state has produced no substantial evidence that the exemption of Catholic Charities from this particular mandate would render the whole scheme ineffective or would be so administratively burdensome as to preclude enforcement. As petitioner poses the question: "[I]f closing the Catholic gap [was] not the problem," how can " 'granting an exemption to Catholic employers' . . . 'defeat the purpose of the bill' "? There has been no showing that the interests served by the WCEA—which focuses on a modest 10 percent gap in coverage—cannot be achieved by less restrictive means.

CONCLUSION

Equality is one of those words, like justice, like freedom, which no one is against. But the invocation of the word "equality" often reduces analysis to empty platitudes. It is important to remember that in America we seek equality because it is a concomitant of freedom. When it is possible to accommodate both, that is what we should do.

BROWN, J.

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SUPREME COURT OF CALIFORNIA

No. S099822

CATHOLIC CHARITIES OF SACRAMENTO INC.,
Petitioner,

v.

The SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

Department of Managed Health Care *et al.*,
Real Parties in Interest.

Sept. 26, 2001

Prior report: Cal.App., 109 Cal.Rptr.2d 176.

Petition for review GRANTED.

GEORGE, C.J., KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., and BROWN, J., concur.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[Filed July 26, 2001]

C037025

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;

DEPARTMENT OF MANAGED HEALTH CARE et al.,
Real Parties in Interest.

PRIOR HISTORY: Super. Ct. No. 00AS03942.

Modified Opinion of July 2, 2001, Reported at: 2001 Cal. App. LEXIS 515. Catholic Charities of Sacramento, Inc. v. Superior Court, 90 Cal. App. 4th 425, 109 Cal. Rptr. 2d 176, 2001 Cal. App. LEXIS 515 (Cal. App. 3d Dist., 2001).

DISPOSITION: Petitioner's petition for rehearing is denied. There is no change in the judgment.

JUDGES: SCOTLAND, P.J., MORRISON, J., CALLAHAN, J.

OPINION

ORDER MODIFYING OPINION AND DENYING REHEARING.

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 2, 2001, be modified in the following respects:

1. On page 32, lines 23-27, and page 33, lines 1-10, delete the paragraph that begins with the words "When challenging a judgment. . . ."

2. On page 33, lines 11-15, delete the paragraph that beings with the words, "Despite these well-established rules
. . . ."

3. On page 33, line 16, delete "In any event," so the sentence now reads:

Catholic Charities has not stated a colorable claim of infringement of its free speech rights.

4. On page 50, lines 17-26, and page 51, lines 1-2, delete the paragraph that beings with the words "Catholic Charities fails to provide . . . ."

5. On page 51, lines [*2] 3-14, delete the paragraph that begins with the words "Due to its failure to provide . . . ."

6. On page 51, line 15, delete "In any event" and capitalize the first letter of the word "for," so the sentence now reads: For reasons that follow, we conclude the exemption is constitutional under the Lemon test.

[There is no change in the judgment]

Petitioner's petition for rehearing is denied.

SCOTLAND, P.J.
MORRISON, J.
CALLAHAN, J.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

[Filed July 2, 2001]

C037025

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent;
DEPARTMENT OF MANAGED HEALTH CARE *et al.*,
Real Parties in Interest.

JUDGES: SCOTLAND, P.J.

We concur: MORRISON, J., CALLAHAN, J.

Asserting that, under the religious tenets of Catholicism, the use of contraception is extrinsically evil and a grave sin, Catholic Charities of Sacramento, Inc. (Catholic Charities), raises constitutional challenges to a statutory scheme which requires that, with an exception not applicable to Catholic Charities, California employers who provide their employees with health insurance coverage or disability insurance coverage that includes prescription drug benefits must also include prescription contraceptives in the coverage. (Health & Saf. Code, § 1367.25; Ins. Code, § 10123.196.)

Catholic Charities is a California public benefit corporation that provides social services to the poor, disabled, elderly, and otherwise vulnerable members of society, regardless of their religious beliefs. It has health insurance coverage with prescription drug benefits for its employees, who represent a diverse group of religious faiths. Catholic Charities believes that, by forcing it to provide prescription

contraceptive coverage, the statutory scheme impermissibly burdens its sincerely held religious beliefs, thereby violating the religious freedom guarantees of both the United States Constitution and California Constitution.

Thus, Catholic Charities filed an action for declaratory and injunctive relief, and sought a preliminary injunction permitting it, pending trial, to provide its employees with health insurance that does not cover prescription contraceptives. When the superior court refused to issue a preliminary injunction, Catholic Charities sought relief in this court. We issued an alternative writ to address this issue of first impression.

We conclude, as did the superior court, it is not reasonably probable that Catholic Charities's action will prevail on the merits. As we will explain, the prescription contraceptive coverage statutes, which were enacted to eliminate discriminatory insurance practices that had undermined the health and economic well-being of women, are otherwise valid laws that are generally applicable and neutral with respect to religion. Because the statutes have a secular purpose, do not advance or inhibit religion, and do not foster excessive government entanglement with religion, the incidental effect of the statutes on religious beliefs does not violate the religious guarantees of the United States and California Constitutions.

Accordingly, we shall deny the petition for writ of mandate.

BACKGROUND

The statutory scheme and its purpose

The legislative history submitted by the parties discloses that the statutory scheme was enacted to eliminate discriminatory insurance practices which had undermined the health and economic well-being of women.

According to materials considered by the Legislature and statements made during the legislative hearings, prescription contraceptives statistically are the most effective methods of birth control and are an essential part of women's healthcare during their reproductive years, which span several decades.

Despite their importance to women's healthcare and their availability for four decades, prescription contraceptives are not included in 49 percent of health plan formularies; whereas most drugs approved by the Federal Drug Administration (FDA) appear almost immediately on health plans. Oral contraceptives are the only class of FDA-approved prescriptions routinely excluded from insurance coverage.

Only women are burdened by this health coverage exclusion because prescription contraceptive methods are used only by women; there are no prescription contraceptive methods available for men.

Mainly due to this exclusion, women pay 63 to 68 percent higher out-of-pocket healthcare costs than men. Almost 5 million privately-insured women between the ages of 14 and 44 have out-of-pocket health expenditures exceeding 10 percent of their income. Women who cannot afford these additional costs must forgo using prescription contraceptive methods, which results in an increase in unwanted or unintended pregnancies. The average sexually active woman would have four pregnancies in five years if she did not use contraception.

The American College of Obstetricians and Gynecologists reports that unintended pregnancies can have serious medical, even life-threatening consequences to a woman's health. Unplanned pregnancies cause health problems not only for women, but also for their unplanned babies. Short intervals between pregnancies are associated with high risks of low birth weight and premature deliveries. Oral contraceptives also have nonpregnancy-related health benefits

because they reduce the risk of contracting certain forms of cancer.

Hence, cost-effective access to prescription contraceptives results in substantial health benefits for women.

The Legislature also received information indicating that, in order for women to achieve and maintain economic and social parity and independence, it is essential that they have the ability to reliably control their reproductive capacity. Moreover, the ability of women to control reproductive health is a major factor in a nation's economic well being.

In response to these concerns, the Legislature enacted the Women's Contraception Equity Act (Health & Saf. Code, § 1367.25 & Ins. Code, § 10123.196; Stats. 1999, ch. 538, § 1), which requires group and individual health insurance policies and disability insurance policies that include prescription drug benefits to also include coverage for prescription contraceptive methods.[1] Hereafter, we will refer

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[1] Health and Safety Code section 1367.25 provides in pertinent part: "(a) Every group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2000, and every individual health care service plan contract that is amended, renewed, or delivered on or after January 1, 2000, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits: [P] (1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration approved prescription contraceptive methods designated by the plan. In the event the patient's participating provider, acting within his or her scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient's medical or personal history, the plan shall also provide coverage for another federal Food and Drug Administration approved, medically appropriate prescription contraceptive method prescribed by the patient's provider."

Insurance Code section 10123.196 provides in pertinent part: "(a) Every individual and group policy of disability insurance issued,

to this legislation as "the prescription contraceptive coverage statutes."

During the legislative process, various Catholic groups asked the Legislature for a "conscience clause" which would enable them to obtain employee health insurance coverage that does not include prescription contraceptive benefits. The groups pointed out that, according to their religious beliefs, using contraception is a sin, and providing prescription contraceptive benefits is the equivalent of facilitating sin, which their religion prohibits. Therefore, they argued, without a "conscience clause" exception, the statutes would impermissibly burden their religious freedom.

The Legislature sought to address this concern without significantly undermining the anti-discrimination and public welfare goals of the prescription contraceptive coverage statutes, and without imposing the employers' religious beliefs on employees who did not share those beliefs. It reached a compromise by enacting an exemption that permits "religious employers," for whom contraception "is contrary to [their] religious tenets," to obtain employee health and disability insurance policies without coverage of prescription contraceptive methods. (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d).)

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amended, renewed, or delivered on or after January 1, 2000, that provides coverage for hospital, medical, or surgical expenses, shall provide coverage for the following, under the same terms and conditions as applicable to all benefits: [P] (1) A disability insurance policy that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration (FDA) approved prescription contraceptive methods, as designated by the insurer. If an insured's health care provider determines that none of the methods designated by the disability insurer is medically appropriate for the insured's medical or personal history, the insurer shall, in the alternative, provide coverage for some other FDA approved prescription contraceptive method prescribed by the patient's health care provider."

The "religious employers" exemption is defined narrowly. It applies only to those who satisfy the following four criteria: "(A) The inculcation of religious values is the purpose of the entity. [P] (B) The entity primarily employs persons who share the religious tenets of the entity. [P] (C) The entity serves primarily persons who share the religious tenets of the entity. [P] (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended [which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order]." (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d).)[2]

Catholic Charities concedes that it does not meet any of the four criteria necessary to qualify for the religious employer exception. It serves people of all faiths and does not proselytize or attempt to inculcate those it serves with its religious beliefs. Its employees, 74 percent of whom are not Catholic, come from a diverse group of religious faiths. It offers social services to the general public that promote a just and compassionate society, reduce the causes of poverty, and build healthy communities. And it is a nonprofit public benefit organization exempt from federal income tax pursuant to section 501(c)(3) of the Internal Revenue Code, rather than section 6033(a)(2)(A)(i) or (iii) of that code.

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[2] The statutes require religious employers to provide notice to prospective employees that they do not cover contraceptive health care services for religious reasons. (Health & Saf. Code, § 1367.25, subd. (b)(2); Ins. Code, § 10123.196, subd. (d)(2).) The statutes also provide: "Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health" of an enrollee or insured. (Health & Saf. Code, § 1367.25, subd. (c); Ins. Code, § 10123.196, subd. (e).)

The lawsuit

Because Catholic Charities does not qualify for the religious employer exception to the prescription contraceptive coverage statutes, it filed a complaint for injunctive and declaratory relief, and moved for a preliminary injunction pending trial.

The complaint and request for a preliminary injunction allege the following: Under the religious tenets of Catholicism, contraception is intrinsically evil and a grave sin. Catholics are precluded from facilitating sinful or evil conduct. Providing employee health insurance coverage that includes prescription contraceptive methods would facilitate financially the sin of contraception by employees who use the prescription drug benefit to obtain contraception. Catholic Charities cannot simply refuse to offer health insurance coverage for employees in order to avoid the burden placed upon its beliefs by the prescription contraceptive coverage statutes. This is so because the Catholic faith morally obliges employers to provide just employment wages and benefits, which includes adequate health insurance coverage. Thus, the statutes present Catholic Charities with the dilemma of either refusing to provide health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs.

For these reasons, the complaint asserts that the prescription contraceptive coverage statutes impermissibly burden Catholic Charities's sincerely held religious beliefs in violation of the First Amendment of the United States Constitution and Article I, section 4 of the California Constitution.

The ruling on the request for a preliminary injunction

The superior court found no reasonable probability that Catholic Charities would prevail on the merits of its action because it has not shown that the prescription contraceptive

coverage statutes unconstitutionally infringe upon its right to freely exercise its religion or that the statutes unconstitutionally favor one religion over another. Accordingly, the court denied Catholic Charities's motion for a preliminary injunction pending trial on the complaint.[3]

DISCUSSION

Catholic Charities contends the superior court erred in denying the petition for a preliminary injunction on the ground that its complaint was not likely to succeed on the merits. According to Catholic Charities, the limited nature of the religious employer exemption to the prescription contraceptive coverage statutes violates, as a matter of law, both the Free Exercise Clause and Establishment Clause of the

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[3] It appears Catholic Charities does not currently offer disability insurance benefits to its employees. The first amended complaint alleges that Catholic Charities is seriously contemplating offering long-term disability benefits to its employees but, because of the mandate imposed by Insurance Code section 10123.196, it is unable to obtain a group disability insurance policy that does not include coverage for prescription contraceptives. Thus, Catholic Charities argued, absent the requested declaratory and injunctive relief sought, it is precluded from obtaining the desired disability insurance coverage for its employees due to the burden Insurance Code section 10123.196 places on its religious beliefs.

The Attorney General contends that the mere possibility Catholic Charities might obtain disability insurance for its employees in the future is too conjectural to justify present injunctive relief with respect to Insurance Code section 10123.196 because Catholic Charities cannot show it is currently injured.

Since we must address Catholic Charities's constitutional challenges to Health and Safety Code section 1367.25, which are identical to those raised with respect to Insurance Code section 10123.196, we need not address the Attorney General's procedural argument. As we will explain, because Catholic Charities's constitutional challenges to Health and Safety Code section 1367.25 fail, its challenges to Insurance Code section 10123.196 necessarily fail as well.

First Amendment of the United States Constitution as well as the California Constitution.

"Where [the preliminary injunction aspect of] the 'likelihood of prevailing on the merits' factor depends upon a question of law rather than upon evidence to be introduced at a subsequent full trial, the standard of review is not abuse of discretion but whether the superior court correctly interpreted and applied [the] law . . . ." (*Efstratis v. First Northern Bank* (1987) 59 Cal. App. 4th 667, 671-672.) Hence, we review de novo the merit of Catholic Charities's constitutional claims. (*Ibid.*)

I

We begin by addressing Catholic Charities's claim that the limited nature of the religious employer exemption violates the Free Exercise Clause of the United States Constitution because it impermissibly burdens Catholic Charities's religious beliefs about contraception without being justified by a compelling governmental interest.

The Free Exercise Clause protects the freedom "to believe and profess whatever religious doctrine one desires" and provides considerable, though not absolute, protection to practice one's religion. (*Employment Division v. Smith* (1990) 494 U.S. 872, 876-878 [108 L. Ed. 2d 876, 884-885, 110 S. Ct. 1595].)

As noted by the United States Supreme Court in *Employment Division v. Smith, supra,* 494 U.S. 872 [108 L. Ed. 2d 876] (hereafter *Smith*), certain alleged violations of the Free Exercise Clause generally were subjected to a strict scrutiny standard of review prior to the *Smith* decision in 1990. A government regulation that imposed a substantial burden on an individual's right to free exercise of religion was constitutional only if it could be justified as the least restrictive means of furthering a compelling governmental interest. (*Id.* at p. 883 [108 L. Ed. 2d at p. 888]; *Sherbert v.*

Verner (1963) 374 U.S. 398, 402-403 [10 L. Ed. 2d 965, 969-970, 83 S. Ct. 1790] (hereafter *Sherbert*).)

In *Smith*, the United States Supreme Court clarified that strict scrutiny does not apply to all free exercise challenges. An otherwise valid and constitutional law in an area in which the state is free to regulate, which law is neutral and of general applicability, need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. (*Smith, supra,* 494 U.S. at pp. 878-879, 884-885, 888-890 [108 L. Ed. 2d at pp. 885-886, 889-890, 892-893].)

Smith explained that the government's ability to enforce generally applicable prohibitions of socially harmful conduct or to carry out public policy "'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' [Citation.] To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,' [citation]—contradicts both constitutional tradition and common sense." (*Smith, supra,* 494 U.S. at p. 885 [108 L. Ed. 2d at p. 890], fn. omitted.) Applying the compelling government interest test in this fashion would produce "a private right to ignore generally applicable laws—[which would be] a constitutional anomaly." (*Id.* at p. 886 [108 L. Ed. 2d at p. 890].)

"Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' [citation], and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [Such a rule] . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . . The

First Amendment's protection of religious liberty does not require this." (*Smith, supra,* 494 U.S. at pp. 888-889 [108 L. Ed. 2d at p. 892], text, citations and fn. omitted.)

Smith noted that a society that wishes to protect religious belief can be expected to enact laws to foster religious freedom. "But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." (*Smith, supra,* 494 U.S. at p. 890 [108 L. Ed. 2d at p. 893].)[4]

As we shall explain, the strict scrutiny test does not apply to prescription contraceptive coverage statutes at issue in this case because they are otherwise valid and constitutional laws, which are generally applicable and neutral with respect to religion.

The Legislature's purpose in enacting the statutes was the elimination of gender discrimination in women's health insurance coverage (see summary of legislative history, *ante*)

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[4] In response to *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) to restore the compelling interest test set forth in *Sherbert, supra*, 374 U.S. 398 [10 L. Ed. 2d 965] and *Wisconsin v. Yoder* (1972) 406 U.S. 205 [32 L. Ed. 2d 15, 92 S. Ct. 1526]. (42 U.S.C. § 2000bb(b)(1).) But the United States Supreme Court has declared the RFRA unconstitutional as applied to state and local governmental action. (*City of Boerne v. Flores* (1997) 521 U.S. 507 [138 L. Ed. 2d 624, 117 S. Ct. 2157]; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1541; *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 832.)

in an area afforded constitutional protection, i.e., reproductive freedom. (*Eisenstadt v. Baird* (1972) 405 U.S. 438 [31 L. Ed. 2d 349, 92 S. Ct. 1029] [unmarried persons have a constitutionally protected right of privacy, which encompasses the right to obtain contraceptives]; *Griswold v. Connecticut* (1965) 381 U.S. 479 [14 L. Ed. 2d 510, 85 S. Ct. 1678] [married persons have a right to obtain contraceptives]; *Conservatorship of Valerie N.* (1985) 40 Cal. 3d 143, 161, 219 Cal. Rptr. 387, 707 P.2d 760 [right to use contraception is a fundamental constitutionally protected interest].)

The Legislature's interest in preserving public health and well-being is a compelling one (*Goehring v. Brophy* (9th Cir. 1996) 94 F.3d 1294, 1300), as is its interest in eliminating gender discrimination (cf. *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1368-1369 [by enacting Title VII, Congress targeted the elimination of all forms of discrimination as a highest priority]).

In a recent United States Equal Employment Opportunity Commission (EEOC) decision on coverage of contraception (Coverage Decision), the EEOC held that an employer's failure to offer prescription contraceptive coverage in its health insurance policy when it offers prescription drug coverage for other medical conditions is a discriminatory and unlawful employment practice that violates Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act. (<http://www.eeoc.gov/docs/decision-contraception.html> [as of July 2, 2001].)

In reaching this conclusion, the EEOC reviewed the legislative history of the Pregnancy Discrimination Act (PDA), which prohibits discrimination against women "affected by pregnancy, childbirth, or related medical conditions." (42 U.S.C. § 2000e(k); see *Pacourek v. Inland Steel Co.* (N.D.Ill. 1994) 858 F. Supp. 1393, 1402 [use of the phrase "or related medical conditions" in the PDA is meant to

be expansive and suggests "that its interpretation should favor inclusion rather than exclusion in the close cases."].)

Relying on legislative history, the EEOC concluded that, in enacting the PDA, Congress intended "to address discrimination against female employees that was based on assumptions that they would become pregnant. Congress thus prohibited discrimination against women based on 'the whole range of matters concerning the childbearing process,' and gave women 'the right . . . to be financially and legally protected before, during, and after [their] pregnancies.' It was only by extending such protection that Congress could ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to bear children." (Coverage Decision, *supra*, p. 6, fns. 7-9, at <http://www.eeoc.gov/docs/decision-contraception.html>; citing H.R. Rep. No. 948, 95th Cong., 2d Sess., §§ 3, 5 (1978); remarks of Sen. Williams, 123 Con. Rec. 29, 385 (1977); remarks of Rep. Sarasin, 124 Cong. Rec. H38, 574 (daily ed. Oct. 14, 1978); fns. omitted.)

Accordingly, the EEOC held the PDA necessarily encompasses a prohibition against discrimination related to a woman's use of contraceptives because contraception is a means by which a woman controls her ability to become pregnant. (Coverage Decision, *supra*, at <http://www.eeoc.gov/docs/decision-contraception.html>; see also Law, *Sex Discrimination and Insurance for Contraception* (1998) 73 Washington L.Rev. 363, 381-382.) Thus, an employer's failure to include contraceptive methods in employee prescription benefits when other preventative-type prescription coverage is provided constitutes an unlawful employment practice in violation of the PDA because it circumscribes the treatment options available for women but not for men. (Coverage Decision, *supra*, at <http://www.eeoc.gov/docs/decision-contraception.html>; cf. *Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 682 [77 L. Ed. 2d

89, 101, 103 S. Ct. 2622] [health insurance and other fringe benefits are "'compensation, terms, conditions, or privileges of employment'" within the meaning of Title VII's prohibition against sex discrimination in employment]; see also 29 C.F.R. Pt. 1604, Appen. Intro. ["any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions."].)

Citing *EEOC v. Arabian American Oil Co.* (1991) 499 U.S. 244 [113 L. Ed. 2d 274, 111 S. Ct. 1227], Catholic Charities asserts the EEOC decision is not entitled to any deference. However, the cited case does not hold that administrative decisions of the EEOC are never entitled to any deference. The case simply states that, because the EEOC has no authority to promulgate rules or regulations, the level of deference given to its administrative interpretation of Title VII depends upon "'"the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."' [Citation.]" (*Id.* at p. 257 [113 L. Ed. 2d at p. 287].) In any event, a federal court recently agreed with the EEOC and held that an employer's decision to exclude prescription contraceptives from its employee health insurance benefits constitutes gender discrimination in violation of Title VII as amended by the PDA. (*Erickson v. The Bartell Drug Company* (W.D. Wash. 2001) __ F. Supp. 2d __ [2001 WL 649651].)

Catholic Charities also cites *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 134-135 [50 L. Ed. 2d 343, 353, 97 S. Ct. 401] for the proposition that the fact a decision not to fund contraceptive prescriptions affects only women does not discriminate against women. But that case, which held the exclusion of pregnancy from coverage under a disability benefits plan was not discrimination on the basis of gender,

was abrogated by Title VII of the Civil Rights Act of 1964 as amended by the PDA. (*Newport News Shipbldg. & Dry Dock v. EEOC, supra*, 462 U.S. at p. 670 [77 L. Ed. 2d at p. 94].)

We are persuaded that California's Legislature was entitled to find that excluding prescription contraceptive methods from the prescription drug coverage of employee health insurance discriminates against women by excluding items essential to the medical needs of women during their reproductive years. (See summary of legislative history in BACKGROUND, *ante*.)

The prescription contraceptive coverage statutes enacted by the Legislature to prohibit such discrimination do not require employers to provide prescription contraceptive coverage to their employees. The statutes simply require that, if an employer chooses to provide employee health insurance coverage with prescription drug benefits, it cannot provide coverage that discriminates against women by excluding prescription contraceptive methods.

Thus, the requirement that prescription drug benefit packages include coverage for prescription contraceptive methods is a neutral law of general application.

A religious exemption from this neutral and generally applied civic obligation is not required by the Free Exercise Clause. (*Smith, supra*, 494 U.S. at pp. 888-890 [108 L. Ed. 2d at pp. 892-893].) Nevertheless, because various Catholic organizations expressed a desire for a "conscience clause" exemption from the prescription contraceptive coverage mandate, the Legislature chose to accommodate religious beliefs with an exemption for "religious employers," for whom contraception violates their religious tenets.

Such an accommodation is permissible without violating the Establishment Clause's prohibition against government endorsement of religion, but the accommodation must be neutral toward religion and among religions. (*Corporation of*

Presiding Bishop v. Amos (1987) 483 U.S. 327, 334 [97 L. Ed. 2d 273, 282, 107 S. Ct. 2862] (hereafter *Amos*); *East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal. 4th 693, 712 (hereafter *East Bay*); *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.* (4th Cir. 2000) 224 F.3d 283, 287.)

The Legislature defined "religious employer" narrowly as an entity whose purpose is the inculcation of religious values, who employs and serves primarily persons who share the entity's religious tenets, and who is a nonprofit organization pursuant to a particular tax code section. (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d).) It had a rational, nondiscriminatory reason to limit the exemption in this fashion in order to reduce the concomitant infringement on employees' rights resulting from the religious accommodation, which serves to impose the employer's faith upon the employees, thereby burdening their religious beliefs. (*United States v. Lee* (1982) 455 U.S. 252, 261 [71 L. Ed. 2d 127, 134-135, 102 S. Ct. 1051] [granting a religious exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees]; *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal. 4th 1143, 1170, 1174, 1176, 913 P.2d 909 (hereafter *Smith v. FEHC*).) To say that the employees may work elsewhere is to deny them the full choice of employment opportunities enjoyed by others in the workforce. (Cf. *Smith v. FEHC, supra*, 12 Cal. 4th at p. 1175.)

This balancing of religious accommodation against the rights of employees resulted in an exemption for a religious employer that primarily employs persons sharing its religious beliefs about contraception or primarily employs persons who, one reasonably could conclude based on the religious nature of the employment, agree with or willingly defer their personal choices to the religious tenets espoused by their employer.

The "religious employer" exemption is neutral and generally applicable to all religions. It does not discriminate among religions, but applies to all faiths in the same manner, exempting some but not all parts of all religious organizations.

Accordingly, strict scrutiny does not apply and the incidental effect that the prescription contraceptive coverage statutes have on the religious beliefs of Catholic Charities does not violate the Free Exercise Clause of the United States Constitution. (Cf. *Smith, supra*, 494 U.S. 872 [108 L. Ed. 2d 876, 110 S. Ct. 1595].)

II

Catholics Charities strongly disagrees with our conclusion that the prescription contraceptive coverage statutes are neutral laws of general application.

Citing *Church of Lukumi v. Hialeah* (1993) 508 U.S. 520 [124 L. Ed. 2d 472, 113 S. Ct. 2217] (hereafter *Lukumi*), Catholics Charities claims the statutes target religious conduct for distinctive treatment. Specifically, it argues that the religious employer exemption is not generally applicable because the limited definition of "religious employer" discriminates against the Catholic Church by excluding its various auxiliary organizations, which are integral parts of the church.

Lukumi holds that a law is not neutral, and thus is subject to heightened scrutiny, "if the object of [the] law is to infringe upon or restrict practices because of their religious motivation . . . ." (*Lukumi, supra*, 508 U.S. at p. 533 [124 L. Ed. 2d at p. 490].) Facial neutrality is not determinative; the reviewing court must survey the underlying circumstances to ensure that the law does not accomplish a "religious gerrymander," i.e., that it is not an impermissible attempt to target specific religious practices while excluding other religious or secular practices. (*Id.* at pp. 534-535 [124

L. Ed. 2d at pp. 491-492].) In determining if the object of the law is a neutral one, relevant evidence includes the legislative or administrative history of the law. (*Lukumi, supra*, 508 U.S. at p. 540; 124 L. Ed. 2d at p. 495].)

Lukumi involved ordinances prohibiting the sacrificial killing of animals for religious purposes. The laws were drafted in such a way that they protected the killing of animals for food, hunting, and various other purposes, just not for religious sacrifice. The legislative history disclosed that the laws were purposely drafted in such a manner as to burden only the Santeria religion. In fact, the ordinances were enacted only when proponents of the ordinances realized that the Santerians, who practice religious animal sacrifice, were planning to build a church in the community. (*Lukumi, supra*, 508 U.S. at pp. 526-528, 534-537 [124 L. Ed. 2d at pp. 485-487, 491-493].) Therefore, because the ordinances had as their object the suppression of religion, they were not neutral laws of general application, and were unconstitutional unless they withstood strict scrutiny. (*Lukumi, supra*, 508 U.S. at pp. 542, 545-546 [124 L. Ed. 2d at pp. 496, 498].)

Unlike the situation in *Lukumi*, where the very object of the laws was to discriminate against Santeria religious practices by outlawing them, the object of the prescription contraceptive coverage statutes is not to infringe upon or restrict Catholics' beliefs about contraception because of their religious motivation, but to accommodate those beliefs to the extent possible while protecting the rights of employees and effectuating the legislative purpose of eliminating gender discrimination in health insurance coverage. Some Catholic employers are exempt from the mandate and others are not, but all religions are treated identically. The limited exemption does not cover all religious-affiliated ancillary organizations engaged in "secular-type" pursuits. The Catholic Church is not the only religious entity with affiliated institutions engaged in secular activities; therefore,

it is not the only church whose affiliated entities do not qualify as "religious employers" under the challenged statutory criteria.

There is nothing impermissible about granting an exemption for certain but not all activities. (E.g., *First Assembly of God v. Collier County, Fla.* (11th Cir. 1994) 20 F.3d 419 (hereafter *First Assembly*).)

For example, in *First Assembly,* a church contested enforcement of certain zoning ordinances, one of which designated the area in which the church was located as a multi-family residential district and also permitted a number of community uses, including churches and their "customary accessory uses." The church was operating a homeless shelter, but the code enforcement board ordered the shelter to close because the board determined that a homeless shelter was not a customary accessory use for a church. (*Id.* at p. 420.) The church disagreed, contending that sheltering the homeless is an essential aspect of the Christian religion. (*Id.* at p. 422.)

The district court held the zoning ordinance did not violate the Free Exercise Clause and that strict scrutiny was not required because the ordinance was a neutral law of general application. "This ordinance, as passed, zones an entire residential area and makes a special exception for churches. It is neutral on its face and is of general applicability." (*First Assembly, supra*, 20 F.3d at p. 423.) The fact that the ordinance did not exempt all activity of a religious nature did not negate its neutrality and general applicability.

Catholic Charities argues the legislative history suggests the statutory exemption to the prescription contraceptive coverage statutes is not facially neutral because (1) only the Catholic Church has a core teaching against artificial contraception and also operates an extensive network of hospitals, schools, and social service agencies; (2) only

Catholic employers were discussed specifically during the legislative process; and (3) only the Catholic Church opposed the enactment of the statutes. Therefore, it claims the exemption was carefully gerrymandered to discriminate against the Catholic Church. We disagree.

It is because Catholic groups were the only ones who requested an exemption from the prescription contraceptive coverage statutes that Catholic religious beliefs were discussed in the legislative process. Certainly, the Legislature cannot be faulted for responding to the concerns those groups raised during the process.

Moreover, the Legislature's refusal to accede to demands for a broader exemption does not necessarily render the exemption discriminatory. The portions of the record cited by Catholic Charities disclose the legislative discussions were not hostile to Catholicism. There is nothing indicating that the limitation of the exemption was intended to target Catholic employers' beliefs about contraception, rather than simply protect the rights of employees to be free from gender discrimination in insurance coverage.

If, as Catholic Charities alleges, Catholicism is the only religion that prohibits artificial contraception and, thus, is the only one burdened by the limitation of the exemption, then it also is the only religion that benefits from the religious employer exemption enacted by the Legislature. This cannot be viewed as an attempt to target Catholic religious practices for unfavorable treatment.

Even if the narrow definition of "religious employers" is construed as having a disparate impact in that it affects only the Catholic Church—because allegedly only the Catholic Church prohibits contraception and only its auxiliary organizations would be burdened by not falling within the exemption--this is insufficient to make the exemption facially discriminatory. (*Children's Health. Is A Legal Duty v. Min*

De Parle (8th Cir. 2000) 212 F.3d 1084, 1091 (hereafter *Children's Health.*) "In addition to disparate impact, a 'claimant alleging "gerrymander" must be able to show the absence of a neutral, secular basis for the lines government has drawn.'" (*Ibid.*, quoting *Gillette v. United States* (1971) 401 U.S. 437, 452 [28 L. Ed. 2d 168, 182, 91 S. Ct. 828]; see also *Lukumi, supra*, 508 U.S. at p. 535 [113 S. Ct. at pp. 2227-2228, 124 L. Ed. 2d 492].)

The secular purpose of the prescription contraceptive coverage statutes is to prevent discrimination against women in healthcare insurance, and the exemption is limited so as not to discriminate among religions or restrict religious practices, but to ensure the viability of this statutory purpose (cf. *Droz v. Commissioner of I.R.S.* (9th Cir. 1995) 48 F.3d 1120, 1124) as well as to protect employees from the imposition of their employer's religious beliefs (*United States v. Lee, supra,* 455 U.S. at p. 261 [71 L. Ed. 2d at pp. 134-135]; *Smith v. FEHC, supra,* 12 Cal. 4th at pp. 1170, 1174, 1176).

Accordingly, the exemption was not carefully gerrymandered in order to burden only the Catholic Church, while exempting all other religions. In other words, it is neutral and generally applicable.

III

Citing *Lukumi, supra*, 508 U.S. at pages 537-538 [124 L. Ed. 2d at page 493], Catholic Charities contends that, where a system of, or mechanism for, individualized exemptions from a general requirement is available, the government may not refuse to extend the system to cases of "religious hardship" without a compelling reason. Catholic Charities asserts that such a system exists here because the Legislature provided a limited exemption for religious employers from the prescription contraceptive coverage statutes. It argues that the Legislature's refusal to extend the exemption to cover Catholic Charities "suggests a discriminatory intent" and

"tends to exhibit hostility, not neutrality, towards religion." (Cf. *Bowen v. Roy* (1986) 476 U.S. 693, 708 [90 L. Ed. 2d 735, 750, 106 S. Ct. 2147]; see also *Keeler v. Mayor & City Council of Cumberland* (D. Md. 1996) 940 F. Supp. 879, 886.) Therefore, it contends, we must apply the strict scrutiny standard of review.

The cited cases did not hold that the strict scrutiny test enunciated in *Sherbert, supra*, 374 U.S. 398 [10 L. Ed. 2d 965] applies any time statutory exemptions of any kind are enacted by the Legislature. Rather, they held that the strict scrutiny test applies where (1) there is a mechanism of exemptions open to unfettered discretionary interpretation, and (2) the bureaucratic discretion is enforced in a discriminatory manner against religion. (*Lukumi, supra*, 508 U.S. at pp. 537-538 [124 L. Ed. 2d at p. 493] [only unnecessary killings of animals were prohibited and only sacrificial religious killings were deemed unnecessary, while hunting and most other killings fell outside the prohibition]; *Smith, supra*, 494 U.S. at p. 884 [108 L. Ed. 2d at p. 889] [*Sherbert* test was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct]; *Bowen v. Roy, supra*, 476 U.S. at p. 708 [90 L. Ed. 2d at p. 750] [discussing *Sherbert*, which required an assessment of "good cause" for quitting or refusing to work in order to obtain unemployment compensation benefits, and religious reasons were not considered good cause]; *Keeler v. Mayor & City Council of Cumberland, supra*, 940 F. Supp. at p. 886 [exemptions from ordinance preserving historic buildings required bureaucratic assessment of "deterrent," "substantial benefit," "undue financial hardship" and "best interest," and this assessment was conducted in a manner that discriminated against religion]; see also *Rader v. Johnston* (D.Neb. 1996) 924 F. Supp. 1540, 1552-1553 [university administrators exercised their discretion to grant exceptions to prohibition against off-campus housing in a broad range of secular situations, but

refused to do so for religious observers who wished to live at a Christian housing facility].)

The concern underlying the "individualized exemption" exception seeks to prevent the government from deciding that secular motivations are more important than religious motivations. (*Fraternal Order of Police Newark v. City of Newark* (3d Cir. 1999) 170 F.3d 359, 365.) Consequently, the government may not create a categorical exemption for individuals with a secular objection to a law or regulation but not for individuals with a religious objection. (*Ibid.*)

Here, there are four objective criteria for determining whether the religious employer exemption in the prescription contraceptive coverage statutes applies. They do not require an individualized assessment of discretionary criteria that may be applied in a discriminatory fashion between religious employers of different faiths, or against religious employers in favor of secular employers. They do not create a categorical exemption for secular employers; rather, they create an exemption for religious employers except for those engaged in what could be termed secular pursuits.

In effect, Catholic Charities argues that, in cases where the Legislature is not required to grant an exemption accommodating religious beliefs but does so, then the statute is no longer neutral because it is not all-inclusive, even if the exemption benefits parts of all religious organizations equally as opposed to benefiting one religion over another. Thus, Catholic Charities apparently believes the Legislature must exempt all parts of all religious organizations so as not to discriminate within each religion against nonexempt parts of the religious organizations. In other words, although there is no free exercise claim requiring an exemption from the statute, once the Legislature attempts to accommodate religion with a religious exemption, it cannot limit the exemption for any reason, including a valid secular one, unless the interest is a compelling one.

The Constitution does not compel such a nonsensical result, which, despite the existence of a valid secular purpose to do so, would discourage the Legislature from making any accommodation.

IV

Catholic Charities contends there is an exception to the holding in *Smith*—an exception that requires the strict scrutiny test articulated in *Sherbert* to be used when the free exercise claim of a church is involved as opposed to the free exercise of an individual's religious actions and beliefs. (Citing *Gellington v. Christian Methodist Episcopal Church* (11th Cir. 2000) 203 F.3d 1299 (hereafter *Gellington*); *Combs v. Cen Tx Ann Conf of United Methodist Church* (5th Cir. 1999) 173 F.3d 343 (hereafter *Combs*).) Asserting it is part of the Catholic Church, Catholic Charities argues that it is entitled to application of the strict scrutiny test.

Catholic Charities misinterprets these cases, which simply held the ministerial exception to Title VII of the Civil Rights Act of 1964 survived *Smith*. (*Gellington*, *supra*, 203 F.3d at pp. 1302-1304; *Combs*, *supra*, 173 F.3d at pp. 347-350.)

The ministerial exception exempts from the coverage of various employment laws the employment relationships between religious institutions and their ministers or clergy. "'As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered "clergy" [for purposes of the exception].' [Citation]." (*Rayburn v. General Conf. of Seventh-day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1169.)

The reason for the ministerial exception is that applying employment laws to employment relationships between religious institutions and their ministers or clergy would cause the state to intrude upon matters of church administration and

government, which are matters of a singular ecclesiastical concern. (*Combs, supra,* 173 F.3d at p. 347.) In contrast, the ministerial exception does not apply to lay employees of a religious institution if they are not serving the function of ministers; this is so because the strong religious interest surrounding a church's choice of its representative is absent. (*Bollard v. California Province of Soc. of Jesus* (9th Cir. 1999) 196 F.3d 940, 947.) Therefore, religious employers are not immune from liability under Title VII for gender discrimination against lay employees. (*Id.* at p. 947; *E.E.O.C. v. Fremont Christian School, supra,* 781 F.2d at p. 1366.)

Government action may burden the free exercise of religion in two ways: "by interfering with a believer's ability to observe the commands or practices of his faith, . . . and by encroaching on the ability of a church to manage its internal affairs." (*E.E.O.C. v. Catholic University of America* (D.C. Cir. 1996) 317 U.S. App. D.C. 343, 83 F.3d 455, 460.) The cited cases reasoned that *Smith* focused on the former type of free exercise burden. The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command of his or her church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission. Hence, the ministerial exception continues to apply even if the employment law in question is a neutral law of general application. (*Gellington, supra,* 203 F.3d at pp. 1303-1304; *Combs, supra,* 173 F.3d at pp. 348-349.)

Here, we are not dealing with the ministerial exception to Title VII or with the administration of the Catholic Church's internal affairs. Accordingly, Catholic Charities's reliance on the cited cases is unavailing.

V

According to Catholic Charities, *Smith* indicates that strict scrutiny applies where a free exercise claim is combined with

another alleged violation of a constitutional right such as free speech or the Establishment Clause, thereby presenting what is known as a "hybrid rights" claim. (See *Smith, supra*, 494 U.S. at pp. 881-882 [108 L. Ed. 2d at pp. 887-888]; *E.E.O.C. v. Catholic University of America, supra*, 83 F.3d at p. 467.)

Some courts appear to reject the hybrid rights doctrine (*Kissinger v. Board of Trustees* (6th Cir. 1993) 5 F.3d 177, 180), and others disagree on the strength of the additional constitutional claim required to assert a hybrid rights claim (see *Miller v. Reed* (9th Cir. 1999) 176 F.3d 1202, 1207, and cases cited therein). Assuming it exists, to assert a hybrid rights claim, a free exercise plaintiff must at a minimum "'make out a "colorable claim" that a companion right has been violated—that is, a "fair probability" or a "likelihood," but not a certitude, of success on the merits.' [Citation]." (*Miller v. Reed, supra,* at p. 1207.)

In a conclusory fashion, Catholic Charities contends it "demonstrated that the [prescription contraceptive coverage] statutes carry grave restrictions on its constitutionally protected free speech rights, as well as on its First Amendment Free Exercise rights. The . . . statutes force Catholic Charities to foster concepts and to engage in symbolic speech that sends a message that contraception is morally, socially, legally and religiously acceptable conduct." (Citing *Wooley v. Maynard* (1977) 430 U.S. 705, 714 [51 L. Ed. 2d 752, 762, 97 S. Ct. 1428] (hereafter *Wooley*) [invalidated the compelled display of a license plate slogan that offended an individual's beliefs].)

Catholic Charities has not stated a colorable claim of infringement of its free speech rights. The prescription contraceptive coverage statutes do not require Catholic Charities to repeat an objectionable message out of its own mouth or to use its own property, such as the license plate in *Wooley*, to display an antagonistic message. Nor is it publicly identified or associated with another's message. (Cf. *Glickman v.*

Wileman Bros. & Elliott (1997) 521 U.S. 457, 470-471 [138 L. Ed. 2d 585, 600-601, 117 S. Ct. 2130].)

Catholic Charities is not required to speak but, having chosen to provide employee health insurance coverage with prescription drug benefits, it simply is required to provide benefits that do not discriminate against women. The mere fact that coverage must be provided for certain items and medications is not likely to be viewed as an endorsement of the use of these items and medications. Catholic Charities remains free to advise its employees that it is morally opposed to prescription contraceptive methods and to counsel them to refrain from using such methods.

Catholic Charities also relies on an alleged violation of the Establishment Clause to support its hybrid rights contention. However, as we shall explain in part VII, *post*, Catholic Charities has not stated a colorable establishment clause claim. Accordingly, it has not stated a cognizable hybrid rights claim, and we need not apply heightened scrutiny to its free exercise claim.

For all of the reasons expressed above, Catholic Charities has failed to establish a violation of the Free Exercise Clause of the United States Constitution.

VI

Catholic Charities turns to the California Constitution as a separate basis for overturning the superior court's order. Citing *Smith v. FEHC, supra*, 12 Cal. 4th at page 1177, it notes that the interpretation of our state Constitution's free exercise clause is not dependent upon the manner in which the corresponding federal clause has been applied because our state clause is broader than the federal clause.[5] According to

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[5] Article I, section 4 of the California Constitution provides in pertinent part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not

Catholic Charities, *People v. Woody* (1964) 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (hereafter *Woody*) compels us to use a strict scrutiny standard of review akin to that used in *Sherbert, supra*, 374 U.S. 398 [10 L. Ed. 2d 965], rather than the standard of review set forth in *Smith, supra,* 494 U.S. 872 [108 L. Ed. 2d 876]. We disagree.

In *Woody*, which was decided prior to *Smith*, the California Supreme Court used a strict scrutiny standard of review to conclude that the application of a criminal statute to convict defendants who were Navajos using peyote in a bona fide religious practice violated their First Amendment rights because their religious practice did not frustrate a compelling state interest. (*Woody, supra*, 61 Cal. 2d at pp. 717, 727.) Although the defendants also claimed the criminal statute violated their free exercise rights under the California Constitution (*id.* at p. 718, fn. 1), *Woody* did not evaluate this state claim separately from the federal claim or determine whether strict scrutiny applies to a state claim regardless of the standard of review applied to the federal claim.

Because *Woody* simply applied the then-existing federal standard of review to the defendants' claim under the federal Constitution (*Woody, supra*, 61 Cal. 2d at p. 718), Catholic Charities's reliance on *Woody* is misplaced. The same is true with respect to its reliance on other California Supreme Court cases cited in its points and authorities. (*Walker v. Superior Court* (1988) 47 Cal. 3d 112, 139-140, 253 Cal. Rptr. 1, 763 P.2d 852; *Molko v. Holy Spirit Assn.* (1988) 46 Cal. 3d 1092, 1112-1119, 252 Cal. Rptr. 122, 762 P.2d 46; *In re Arias*

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excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

The First Amendment of the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

(1986) 42 Cal. 3d 667, 692, 230 Cal. Rptr. 505, 725 P.2d 664.)

In *Smith v. FEHC*, the California Supreme Court acknowledged that our state Constitution is a document of independent force, and that we may not abandon settled applications of its terms every time changes are made in the manner in which the federal Constitution is interpreted. (*Smith v. FEHC, supra*, 12 Cal. 4th at p. 1177.) The court noted, however, that a search for the independent meaning of California's free exercise clause "entails a certain amount of frustration" because California courts before *Smith* typically treated the federal and state clauses as being interchangeable. (*Id.* at pp. 1177-1178 [citing the cases relied on by Catholic Charities].) In addition, it noted that older cases applied an approach closer to that of *Smith*. (*Id.* at pp. 1178-1179.)

Because the appellant's free exercise claim failed under the compelling interest standard of review required at that time by the RFRA (see fn. 6, ante), *Smith v. FEHC* found it unnecessary to address the scope and proper interpretation of the California Constitution. (*Smith v. FEHC, supra,* 12 Cal. 4th at p. 1179.)

Hence, the California Supreme Court has not determined that our state Constitution requires free exercise challenges to a neutral law of general application to be reviewed using the compelling interest test.

Brunson v. Department of Motor Vehicles (1999) 72 Cal. App. 4th 1251 (review denied) (hereafter *Brunson*)—decided by the Court of Appeal, Second Appellate District, Division Five, after the RFRA was found unconstitutional as applied to state governmental action—noted that no California Supreme Court case has ever articulated a standard applicable to the free exercise clause of California's Constitution different from that applicable to the United States Constitution. (*Id.* at pp. 1255-1256.) On this basis alone, the

Brunson court held, at page 1256, that it was compelled to follow federal law and apply the rational basis test applicable to neutral laws of general application as set forth in *Smith*.

Catholic Charities claims that *Brunson* was "wrongly decided," in part because article I, section 24 of California's Constitution provides that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Catholic Charities also points out the California Supreme Court has stated: "Respect for our Constitution as 'a document of independent force' [citation] forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter." (*People v. Pettingill* (1978) 21 Cal. 3d 231, 248, 145 Cal. Rptr. 861, 578 P.2d 108.)

What Catholic Charities overlooks is that *Smith v. FEHC* indicates there is no "settled application" of California's free exercise clause. All that is settled is this clause has no counterpart in the federal Constitution because it *guarantees* the free exercise and enjoyment of religion without discrimination or preference, whereas the federal charter simply bars Congress from enacting laws prohibiting the free exercise of religion. (*Sands v. Morongo Unified School Dist.* (1991) 53 Cal. 3d 863, 883, 281 Cal. Rptr. 34, 809 P.2d 809.) At most, the California Supreme Court has observed"' it might be argued that Section 4 offers broader protection [than the First Amendment] because it specifically refers to "liberty of conscience.'" . . ." (*Smith v. FEHC, supra*, 12 Cal. 4th at p. 1179, fn. 22; citation omitted.)

The fact California's Constitution offers broader protection does not ineluctably lead to the conclusion that neutral laws of general application must be subjected to the compelling interest test. A guarantee that one may freely exercise and enjoy one's religion without discrimination or preference is not the equivalent of a guarantee that one's religion may not be burdened incidentally by nondiscriminatory or nonpref-

erential laws absent compelling reasons. In fact, by stating "this liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State," article I, section 4 of California's Constitution acknowledges that one's religious freedom may be curtailed in certain instances for the public good as long as the curtailment is not discriminatory.

Our interpretation of California's free exercise clause is supported by *Ex Parte Andrews* (1861) 18 Cal. 678, which rejected a constitutional challenge to a law requiring certain businesses to be closed on Sunday. The Supreme Court stated it understood the free exercise clause of article I, section 4 "to be an interdict against all legislation which invidiously discriminates in favor of or against any religious system. It does not interdict all legislation upon subjects connected with religion . . . . The operation of the [Sunday closing law] is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religious . . . . The mere fact that this regulation takes effect upon a day which has been appropriated as a day of rest by the sanctions of a particular church, no more destroys the power of the Legislature to command abstinence from labor on that day, than the fact that if the Legislature appointed certain public business to be done on Saturday or Sunday—this would have been 'discriminating' against the sects, according religious sanctity to those days." (*Id.* at pp. 684-685, italics omitted.)

In *Gospel Army v. City of Los Angeles* (1945) 27 Cal. 2d 232, 163 P.2d 704 (hereafter *Gospel Army*), the California Supreme Court upheld, as applied to a religious organization, municipal ordinances regulating charitable contributions and solicitations. Employees of the organization solicited money, food, and clothing from the public, and the contributions were used to pay employee salaries as well as the cost of furnishing religious tracts and literature, food, lodging, clothing, and

carfare to the poor. (*Id.* at p. 234.) The organization claimed that, since it was engaged exclusively in religious activities, the ordinance was not applicable to its solicitations because the ordinances exempted solicitations made solely for evangelical, missionary, or religious purposes. (*Id.* at pp. 249-250.)

The Supreme Court disagreed that the solicitations were conducted solely for religious purposes, finding instead that they were conducted for charitable purposes within the meaning of the ordinances, i.e. for philanthropic, social service, benevolent, and patriotic purposes. Hence, the court held the ordinances were applicable to the religious organization because they did not exempt solicitations for charitable purposes, even if solicitations were undertaken by a religious organization. (*Gospel Army, supra,* 27 Cal. 2d at p. 250.)

The religious organization argued that, since the practice of charity and the solicitation of funds for that purpose are part of its religious duties, the ordinances regulating the solicitation of charitable contributions abridged its religious liberty in violation of the United States and California Constitutions. (*Gospel Army, supra*, 27 Cal. 2d at p. 242.) The Supreme Court disagreed: "Many activities prompted by religious motives can hardly be differentiated from secular activities. If the applicability of government regulation turned on the religious motivation of activities, plausible motivations would multiply and in the end vitiate any regulation. . . . [P] Activities characteristic of the secular life of the community may properly be a concern of the community even though they are carried on by a religious organization. [Citations.] Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but it does not follow that they

may do so as specially privileged groups, free of the regulations that others must observe, If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare." (*Id.* at pp. 243-245, 163 P.2d 704, text and citations omitted.)

Ex Parte Andrews and *Gospel Army* were cited by *Smith v. FEHC*, *supra*, along with other California Supreme Court cases, as evidence that older California cases followed the *Smith* approach and did not require exemptions for religiously motivated conduct from neutral and generally applicable laws. (*Smith v. FEHC*, *supra*, 12 Cal. 4th at p. 1179, citing *Gabrielli v. Knickerbocker* (1938) 12 Cal. 2d 85, 90-92, 82 P.2d 391 [declined to reinstate a public school pupil who was expelled for refusing, on religious grounds, to salute the flag]; *Rescue Army v. Municipal Court* (1946) 28 Cal. 2d 460, 470, 171 P.2d 8 [upheld, as applied to religious organization, municipal ordinances regulating charitable contributions and solicitations].)

Unless and until the California Supreme Court rules otherwise, the application of the rule enunciated in *Smith, supra,* 494 U.S. 872 [108 L. Ed. 2d 876] is consistent with the protections afforded by the free exercise clause of California's Constitution. As the United States Supreme Court pointed out in *Smith*: "'Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . . .'" (*Id.* at p. 879 [108 L. Ed. 2d at pp. 885-886], citation omitted.)

The *Smith* rule is particularly appropriate for reviewing free exercise challenges under our state Constitution given

that the population in California is one of the most diverse in the nation, made up of people of almost every conceivable religious preference. We agree with *Smith* that "precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. [Such a] rule . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . ." (*Smith, supra*, 494 U.S. at pp. 888-889 [108 L. Ed. 2d at p. 892], text, citations, and italics omitted.)

Because we find that the same standard of review applies as was utilized in *Smith*, Catholic Charities's claim under the free exercise clause of the California Constitution fails for the reasons explained in our opinion, *ante*.

VII

Citing *Larson v. Valente* (1982) 456 U.S. 228 [72 L. Ed. 2d 33, 102 S. Ct. 1673] (hereafter *Larson*), "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another" (*id.* at p. 244 [72 L. Ed. 2d at p. 47]), Catholic Charities claims that the religious employer exemption in the prescription contraceptive coverage statutes violates the Establishment Clause of the United States Constitution as well as the California Constitution by exempting some religious employers but not others, thereby favoring certain religions over others. It argues that *Larson* dictates application of the strict scrutiny test where there is such a facial preference

between religions, and that the religious employer exemption cannot withstand such scrutiny.[6]

Catholic Charities is correct that, if the law grants a denominational preference, it may be upheld only if it is supported by a compelling state interest. (*Larson, supra*, 456 U.S. at pp. 246-247 [72 L. Ed. 2d at pp. 49-50]; *Children's Health, supra*, 212 F.3d at p. 1090.) If no such facial preference exists, we apply the Establishment Clause inquiry derived from *Lemon v. Kurtzman* (1971) 403 U.S. 602 [29 L. Ed. 2d 745, 91 S. Ct. 2105] (hereafter *Lemon*). (*Hernandez v. Commissioner* (1989) 490 U.S. 680, 695 [104 L. Ed. 2d 766, 784, 109 S. Ct. 2136]; *Children's Health, supra*, 212 F.3d at pp. 1092-1093.)

A law need not expressly distinguish between religions by sect name to facially discriminate among religions. (*Larson, supra*, 456 U.S. at p. 232, fn. 3, 246 [72 L. Ed. 2d at pp. 40, fn. 3, 49]; *Children's Health, supra,* 212 F.3d at p. 1090.) Objective factors such as the law's legislative history and its practical effect while in operation can evidence such discrimination. (*Lukumi, supra*, 508 U.S. at pp. 535, 540 [124 L. Ed. 2d at pp. 491-492, 495]; *Larson, supra*, 456 U.S. at p. 254 [72 L. Ed. 2d at p. 54].)

Catholic Charities reiterates its belief that the religious exemption in the prescription contraceptive coverage statutes was carefully gerrymandered to discriminate against the Catholic Church. It believes the facts of this case are indistinguishable from the facts in *Larson, supra*, 456 U.S. 228 [72 L. Ed. 2d 33]. We disagree.

In *Larson*, a Minnesota charitable solicitation statute was amended to facially exempt from state registration and

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[6] Because California's Establishment Clause offers no more protection than that of the federal Constitution (*East Bay, supra*, 24 Cal. 4th at pp. 718-719), we shall address these claims together.

reporting requirements only those religious organizations that derived more than half their funds from members. Prior to the statute's amendment, all religious organizations were exempted from the reporting requirement. (*Larson, supra*, 456 U.S. at pp. 231-232, [72 L. Ed. 2d at pp. 39-40].) The history of the amendment revealed that it was "drafted with the explicit intention of including particular religious denominations and excluding others" and that it was based on hostility to "Moonies," members of the Unification Church, who solicited donations at airports. (*Id.* at p. 254 [72 L. Ed. 2d at p. 54].) The wording of the proposed amendment was changed so the Roman Catholic Archdiocese would be exempted but the Unification Church would not be similarly exempt. (*Ibid.*)

This 50 percent rule effectively distinguished between (1) well-established churches that had achieved strong financial support from their members, and (2) churches that were newer and lacked a constituency, or that favored public solicitation over reliance on financial support from members. Therefore, it was not a facially neutral statute, the provisions of which happened to have a disparate impact upon different religious organizations. (*Larson, supra*, 456 U.S. at pp. 246-247, fn. 23 [72 L. Ed. 2d at pp. 49-50, fn. 23].) Rather, the 50 percent rule deliberately distinguished between different religions in a manner that assured only certain religions would receive the benefit of the exemption. (*Ibid.*)

Larson is of no assistance to Catholic Charities. It simply "indicates that laws discriminating among religions are subject to strict scrutiny, . . . and that laws 'affording a uniform benefit to all religions' should be analyzed under Lemon . . . ." (*Amos, supra*, 483 U.S. at p. 339 [97 L. Ed. 2d at p. 285], citations omitted, italics omitted.)

Here, the language of the religious employer exemption in the prescription contraceptive coverage statutes is sect-neutral. It does not include or disqualify any sect by name, or

make deliberate distinctions that serve to include certain sects while excluding others. (Cf. *Hernandez v. Commissioner, supra,* 490 U.S. at pp. 683, 695-696 [104 L. Ed. 2d at pp. 776, 783-784] [tax code provisions on charitable donations to organizations organized and operated for religious purposes are not subject to strict scrutiny because they do not discriminate between sects]; *Children's Health, supra,* 212 F.3d at pp. 1088-1091 [Medicare and Medicaid amendments extending benefits to religious nonmedical healthcare institutions are not subject to strict scrutiny since they do not discriminate between sects].)

The Catholic Church benefits from the exemption, as do all other religions; the exemption simply does not cover all of its organizations, such as Catholic Charities. Because the same is true for all other religions' ancillary organizations, all religions are equally burdened and benefited. As long as the exemption applies to all religions equally, the fact that it does not encompass all conceivable religious employers does not render it unconstitutional. (Cf. *Droz v. Commissioner of I.R.S., supra*, 48 F.3d at p. 1124 [exemption from Social Security tax given to members of religious sects that have tenets opposed to the acceptance of public benefits, but not to individuals who share the same religious beliefs but are not a member of such a sect, does not violate the Establishment Clause because of valid secular purpose for limiting the exemption in this manner].)

In any event, even if the narrow definition of "religious employer" is construed as having a disparate impact, this is insufficient to make the exemption facially discriminatory. (*Children's Health, supra*, 212 F.3d at p. 1091.) "[A] claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn." (*Gillette v. United States*, *supra*, 401 U.S. at p. 452 [28 L. Ed. 2d at p. 182] [limiting religious "conscientious objector" exemption from the draft to those

opposed to all wars, rather than to particular wars viewed as "unjust," did not violate the Establishment Clause because the exemption was available on an equal basis and had a valid neutral and secular purpose]; compare *Lukumi, supra*, 508 U.S. at p. 535 [124 L. Ed. 2d at p. 492].)

Catholic Charities has not made such a showing. As we have discussed previously, limiting the religious employer exemption to cover only what can be termed "sectarian" religious employers reflects valid secular justifications, and does not constitute a religious gerrymander subject to strict scrutiny.

Catholic Charities disagrees, claiming the Legislature impermissibly injected itself into church affairs by redefining the Catholic Church and carving it up into religious and secular segments. Citing *Mitchell v. Helms* (2000) 530 U.S. 793 [147 L. Ed. 2d 660, 120 S. Ct. 2530] (hereafter *Mitchell*), Catholic Charities argues that the Legislature may not undertake an analysis regarding whether an entity is religious or secular as this is based on the "pervasively sectarian" doctrine rejected by the Supreme Court. In Catholic Charities's view, the religious employer exemption is infirm since it distinguishes between religious employers who are engaged in sectarian pursuits and those engaged in more secular pursuits, such as providing social services.

In *Mitchell*, some taxpayers challenged a school aid program, alleging it violated the Establishment Clause by providing aid to parochial schools. Under the program, the federal funds are distributed to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools, including parochial schools. (*Mitchell, supra,* 530 U.S. at pp. 801-803 [120 S. Ct. at pp. 2537-2538, 147 L. Ed. 2d at pp. 670-672].) Several restrictions apply to aid provided to private schools, including that the "'services, materials, and equipment'" must be

"'secular, neutral, and nonideological.'" (530 U.S. at p. 802 [147 L. Ed. 2d at p. 671].)

Mitchell held the program did not constitute government endorsement of religion in violation of the Establishment Clause. The court concluded that some direct, nonincidental government aid to religious schools is permissible if it is available neutrally to both secular and religious schools on a nondiscriminatory basis, if the aid is not itself unsuitable for use in public schools because of religious content, and if eligibility for aid is determined in a constitutionally permissible manner. (*Mitchell, supra*, 530 U.S. at pp. [147 L. Ed. 2d at pp. 675-686.)

The plurality in *Mitchell* also stated the Establishment Clause does not require the exclusion of pervasively sectarian schools from otherwise permissible aid programs. (*Mitchell, supra,* 530 U.S. at p. [147 L. Ed. 2d at pp. 686-688].) At one time, whether school aid was unconstitutional depended upon whether the recipient school was "pervasively sectarian." (530 U.S. at p. 826 [147 L. Ed. 2d at p. 686].) The plurality indicated this factor no longer should be used, stating "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." (530 U.S. at p. 828 [147 L. Ed. 2d at p. 687].) The plurality noted that "the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose." (*Ibid.*)

Catholic Charities's reliance on *Mitchell* is misplaced for the following reasons.

First, "it is well settled that in a plurality opinion, 'the holding of the Court may be viewed as that position taken by

those Members who concurred in the judgments on the narrowest grounds.' . . . In *Mitchell*, there is no single part of any opinion that commands the support of a majority of the Court. As a result, the only binding precedent of *Mitchell* is the holding." (*Steele v. Industrial Dev. Bd. of Metropolitan Gov.* (M.D. Tenn. 2000) 117 F. Supp. 2d 693, 706, citations omitted.)

Second, Catholic Charities's challenge does not concern government financial aid to sectarian schools or organizations. The Legislature has not denied aid to religious organizations on the basis of the sectarian nature of the organizations. Rather, it has granted a beneficial exemption to religious organizations, while excluding "secular-type" religious organizations because extending the exception to such organizations will unduly interfere with the state's secular purpose of eliminating gender discrimination in health insurance coverage. Nothing in *Mitchell* prohibits this.

Contrary to Catholic Charities's assertion, the Legislature is not defining the Catholic Church, or any other church for that matter, nor dictating the manner in which the Catholic Church is to conduct its internal affairs. The Legislature simply has defined the type of employers that fall within the religious employer exemption, and has done so in a manner necessary to effectuate the secular purpose of the prescription contraceptive coverage statutes. This is entirely permissible. The government is not compelled to accept a religious organization's self-definition in determining the coverage of employment regulation. (*Dole v. Shenandoah Baptist Church* (4th Cir. 1990) 899 F.2d 1389, 1396 [rejecting religious school's Establishment Clause claim that it was entitled to religious exemption from the Fair Labor Standards Act because its Church was exempt, labor laws could not permissibly differentiate between the two, and the government was required to accept the church's characterization of the school as an inseverable part of the church].)

Accordingly, we must use the three-pronged test set forth in *Lemon, supra,* 403 U.S. 602 [29 L. Ed. 2d 745], which provides that, to withstand an Establishment Clause challenge, a statute must have a secular legislative purpose, its primary purpose must neither advance nor inhibit religion, and the statute must not foster excessive government entanglement with religion. (*Id.* at pp. 612-613 [29 L. Ed. 2d at p. 755].) As the California Supreme Court has noted, the *Lemon* test "is ill-suited to evaluating an establishment clause challenge to a law that creates an exemption for religious bodies from a neutral law of general application," but it is the appropriate test to use. (*East Bay, supra*, 24 Cal. 4th at p. 706.)

For reasons that follow, we conclude the exemption is constitutional under the *Lemon* test.

The first requirement of the test is that the statutes have a secular legislative purpose. This does not mean the law's purpose must be unrelated to religion, just that the government has not abandoned neutrality and acted with the intent of promoting a particular point of view in religious matters. (*Amos, supra*, 483 U.S. at p. 335 [97 L. Ed. 2d at pp. 282-283]; *Ehlers-Renzi v. Connelly School of the Holy Child, supra*, 224 F.3d at p. 288.)

The Legislature did not have such an impermissible intent when it enacted the religious employer exemption in the prescription contraceptive coverage statutes. The valid secular purpose was to accommodate those who oppose contraception on religious grounds without undermining the public policy goal of eliminating gender discrimination in insurance benefits at the expense of employees who do not share their employer's religious tenets. This is a rational, nondiscriminatory reason for limiting the exemption.

A statute "does not violate the second part of the *Lemon* test [whether the primary effect of the statute impermissibly

enhances or inhibits religion] merely because it gives special consideration to a religious group or even because it better enables a religious institution to advance its cause." (*Children's Health, supra*, 212 F.3d at p. 1095.) Rather, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence," rather than advancement coming from the religious organization itself. (*Amos, supra*, 483 U.S. at p. 337 [97 L. Ed. 2d at pp. 283-284], orig. italics.) Nor will a statute violate the second part of the *Lemon* test where it "[does] not or would not impose *substantial burdens* on nonbeneficiaries while allowing others to act according to their religious beliefs," or where it is "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." (*Texas Monthly, Inc. v. Bullock* (1989) 489 U.S. 1, 18, fn. 8 [103 L. Ed. 2d 1, 15, 109 S. Ct. 890], italics added.)

Catholic Charities does not appear to believe that the enactment of prescription contraceptive coverage statutes with a limited religious employer exemption impermissibly *enhances* religion. And by no stretch of the imagination can it be said that the ability of the exemption's beneficiaries to propagate their religious doctrine is greater now than it was before the statutory scheme was enacted, or that the government itself has advanced religion through its own activity of enacting statutes designed to eliminate gender discrimination in insurance benefits. (*Amos, supra*, 483 U.S. at p. 337 [97 L. Ed. 2d at p. 283-284.)

What Catholic Charities suggests is that, by excluding from the religious employer exemption a religious entity's ancillary organizations that are engaged in secular activities, the statutory scheme impermissibly *inhibits* religion. We disagree. When such an organization elects to provide its employees with health or disability insurance coverage with prescription drug benefits, requiring the policies to cover

prescription contraceptive methods—so as not to discriminate against women—cannot be said to inhibit religion, even if its parent entity is a religious organization that believes the use of contraceptives is a sin. Being compelled to provide such coverage cannot be viewed as endorsing the use of contraceptives; to the contrary, the organization remains free to advise its employees that it is morally opposed to prescription contraceptive methods and to counsel them to refrain from using such methods. For us to conclude otherwise would mean that such a provider of secular services could impose its own religious views on its employees by refusing to provide them with health coverage that is available to the employees of other entities performing secular services. That, we think, is not what the Establishment Clause stands for. And, to the extent compelling that coverage will result in added costs to such organizations which elect to provide health or disability policies to their employees, this burden is "too minimal and diffuse to violate the second part of the *Lemon* test." (*Children's Health, supra*, 212 F.3d at p. 1096.)

As reflected in the legislative history we have summarized, *ante*, the narrowly-defined religious employer exemption in the prescription contraceptive coverage statutes was "designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." (*Texas Monthly, Inc. v. Bullock, supra,* 489 U.S. at p. 18, fn. 8 [103 L. Ed. 2d at p. 15].) Accordingly, the exemption cannot be said to violate the second prong of the *Lemon* test. (*Ibid.*)

This brings us to the third part of the *Lemon* test, the statute must not foster excessive government entanglement with religion. "Although it is difficult to attach a precise meaning to the word 'entanglement,' courts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pits church and state as

adversaries,' [citation] and where the Government is placed in a position of choosing among 'competing religious visions.' [Citation.]" (*E.E.O.C. v. Catholic University of America, supra,* 83 F.3d at p. 465.) Therefore, excessive entanglement has been found "where religious and state employees must work closely together to carry out the statutory scheme, when the state becomes involved in scrutinizing religious content or when enforcement requires government investigators to make on site inspections or engage in surveillance of the religious organization to ensure a secular purpose is served." (*Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal. App. 3d 1269, 1288, 250 Cal. Rptr. 891, affd. (1990) 493 U.S. 378 [107 L. Ed. 2d 796, 110 S. Ct. 688].) In other words, there is a distinction between regulatory action that requires ongoing government supervision and that which requires a limited inquiry. (*DeMarco v. Holy Cross High School* (2d Cir. 1993) 4 F.3d 166, 169-170.)

Catholic Charities briefly asserts there is excessive governmental entanglement with respect to the religious employer exemption because, in its view, the state must undertake prolonged monitoring and "engage in rendering theological judgments" to determine whether a religious-affiliated employer qualifies for the exemption. We are not persuaded.

First, the statutes do not require state certification or any other input from the state as to whether an entity is a "religious employer." (Health & Saf. Code, § 1367.25, subd. (b); Ins. Code, § 10123.196, subd. (d).) Unless the insurer disputes an entity's entitlement to a policy without coverage for contraceptive methods, or an employee questions the entity's "religious employer" status, the state will not be involved.

Second, determining whether the exemption applies involves a limited inquiry regarding whether the entity's religious tenets oppose contraception and its primary purpose

is the inculcation of religious values, a statistical inquiry about the number of employees and persons served by the entity who share the entity's opposition to contraception, and an objective legal inquiry regarding the entity's tax status.

As to the first inquiry, the state must accept an entity's assertion that contraception is contrary to its religious tenets. (Cf. *Smith v. FEHC, supra*, 12 Cal. 4th at pp. 1167-1168; *DeMarco v. Holy Cross High School, supra*, 4 F.3d at pp. 171-172.) Because the state has conceded that opposing the use of contraception is a valid religious tenet, there would be no questioning that belief qualifies as "religious." Hence, there would be no questioning about the entity's religious values, other than whether the entity's purpose is the inculcation of others with those values, whatever they may be. This latter inquiry does not require excessive government entanglement because it turns not upon a subjective evaluation of the religious motivation of the entity's activities but upon an assessment of whether, by an objective standard, the activities are "characteristic of the secular life of the community" (*Gospel Army, supra*, 27 Cal. 2d at p. 244), such as the services provided by Catholic Charities.

Accordingly, there is no ongoing or continuous supervision of the religious employer and no interpretation of church doctrines and the importance of these doctrines to the religious employer; and the state is not placed in a position of choosing among competing religious visions.

In sum, enforcement of the statutory scheme does not require excessive intrusion into religious affairs. (Cf. *Tony & Susan Alamo Foundn. v. Sec. of Labor* (1985) 471 U.S. 290, 305-306 [85 L. Ed. 2d 278, 290-291, 105 S. Ct. 1953] [applying Fair Labor Standards Act's recordkeeping requirements to a nonprofit religious foundation does not violate the Establishment Clause]; *Geary v. Visitation of the Blessed Virgin Mary* (3d Cir. 1993) 7 F.3d 324, 328 [applying Age Discrimination in Employment Act to the lay faculty of a

religious school does not present a significant risk of entanglement]; *E.E.O.C. v. Fremont Christian School, supra*, 781 F.2d at p. 1370 [applying Title VII to regulate religious employers' employee compensation is not an impermissible entanglement with religion].)

Catholic Charities also protests that the definition of "religious employer" is difficult to apply and uncertain in its application. (Citing *Amos, supra*, 483 U.S. at p. 336 [97 L. Ed. 2d at p. 283] [it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.].) Again, we disagree. The statutory definition of the religious employer exemption provides discrete criteria that enable a religious employer to easily determine whether the exemption applies. The employer must be an entity coming within the provisions of a specific tax code section, must employ and serve primarily people who share the employer's religious tenets opposing contraception, and the entity's purpose must be the inculcation of religious values and not simply to engage in "religious activities."

VIII

For all of the reasons stated above, Catholic Charities has failed to establish that it is likely to prevail on the merits of its constitutional challenges. Accordingly, the superior court properly denied Catholic Charities's request for a preliminary injunction pending trial.[7]

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[7] Amicus curiae briefs have been filed by numerous different entities. To the extent that those briefs raise arguments not presented in Catholic Charities's petition for writ of mandate or raise arguments that were not tendered in the superior court, we decline to address them. Amicus curiae must accept the issues urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal. App. 4th 1264, 1274-1275.)

DISPOSITION

The petition for a writ of mandate is denied. Háving served its purpose, the alternative writ is discharged.

SCOTLAND, P.J.

We concur:

MORRISON, J.
CALLAHAN, J.

TENTATIVE RULINGS

Department 54
Superior Court of California
800 H Street
Joe S. Gray, Judge
Barbara Baldy, Clerk
None, Bailiff

October 31, 2000, 09:00

ITEM 4

00AS03942

CATHOLIC CHARITIES OF SACRAMENTO, INC.
VS.
STATE OF CA ET AL

Nature of Proceeding:

MOTION FOR RECONSIDERATION

Filed By: SWEENEY, JAMES F.

Plaintiff's Motion for Reconsideration is GRANTED inasmuch as the FDA's very recent approval of mifepristone, or "RU-486", as a method of prescriptive abortion, does constitute a new fact this this Court would have considered in ruling on plaintiff's request for a preliminary injunction. After reconsidering the matter, however, the Court's initial ruling denying injunctive relief still stands. Mifepristone is an abortion drug as opposed to a contraceptive device and consequently is beyond the scope of the legislation in question which pertains only to prescription contraceptives. If mifepristone can be used for a purpose other than abortion (the Court expresses no opinion on whether, for example, it may be used contraceptively prior to the moment of actual conception), the Court notes that mifepristone's potential use as a contraceptive would be viewed no differently than any

other form of contraception. This Court's reasoning in denying injunctive relief was not predicated in any way upon specific prescription contraceptive methods.

This minute order is effective immediately. No formal order or other notice is required, the tentative ruling providing sufficient notice.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Case No: 00AS03942

DATE/TIME: SEPTEMBER 28, 2000
DEPT. NO: 54
JUDGE: JOE S. GRAY
CLERK: P. ALLEN
REPORTER: NONE
BAILIFF: J. HANCOCK

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Plaintiff,

VS.

STATE OF CALIFORNIA, ET AL.,
Defendant

Nature of Proceedings: RULING ON SUBMITTED MATTER PRELIMINARY INJUNCTION

The Court having taken the above matter under submission, now rules as follows: the tentative ruling is affirmed.

Certificate of Service by Mailing attached.

Book: 54
Page: 252
Date: September 28, 2000
Case No.: 00AS03942
Case Title: CATHOLIC VS. STATE OF CA.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

BY: P. ALLEN,
Deputy Clerk

TENTATIVE RULINGS

Department 54
Superior Court of California
800 H Street
Joe S. Gray, Judge
D. Rogers, Clerk
J. Hancock, Bailiff
September 27, 2000, 09:00

ITEM 1
00AS03942

CATHOLIC CHARITIES OF SACRAMENTO, INC.

vs.

STATE OF CA ET AL
Nature of Proceeding: PRELIMINARY INJUNCTION

Filed By: SWEENEY, JAMES F.

Plaintiff Catholic Charities' Motion for Preliminary Injunction is DENIED.

In order to demonstrate entitlement to the injunctive relief being sought, plaintiff must establish that it is "reasonably probable" that Catholic Charities will prevail on the merits in this lawsuit. (*San Francisco Newspaper Printing Co., Inc. v. Superior Court* (1985) 170 Cal.App.3d 438, 442). The Court does not believe that plaintiff has satisfied that requirement.

The constitutional challenges to the statutes in question have two primary components. First, plaintiff asserts that its right to free exercise and enjoyment of religion, as guaranteed by the California and United States Constitutions, is violated by the exemption provisions contained in the statutes. Secondly, plaintiff contends that the exemption provisions specifically target certain portions of the Catholic Church, including plaintiff herein, and consequently run afoul of the Establishment Clauses contained in both the state and federal constitutions, as well as related "equal protection" concerns.

Plaintiff has not shown to any reasonable probability that that the challenged statutes impose a substantial infringement of its free exercise of religion or that they violate the Establishment Clauses by favoring one religion over another.

This minute order is effective immediately. No formal order or other notice is required, the tentative ruling providing sufficient notice.

Cal. Health & Safety Code § 1367.25 (2004)

(a) Every group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2000, and every individual health care service plan contract that is amended, renewed, or delivered on or after January 1, 2000, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits:

(1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration approved prescription contraceptive methods designated by the plan. In the event the patient's participating provider, acting within his or her scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient's medical or personal history, the plan shall also provide coverage for another federal Food and Drug Administration approved, medically appropriate prescription contraceptive method prescribed by the patient's provider.

(2) Outpatient prescription benefits for an enrollee shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(b) Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for federal Food and Drug Administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for contraceptive methods.

(1) For purposes of this section, a "religious employ er" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

(2) Every religious employer that invokes the exemption provided under this section shall provide written notice to prospective enrollees prior to enrollment with the plan, listing the contraceptive health care services the employer refuses to cover for religious reasons.

(c) Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an enrollee.

(d) Nothing in this section shall be construed to deny or restrict in any way the department's authority to ensure plan compliance with this chapter when a plan provides coverage for prescription drugs.

(e) Nothing in this section shall be construed to require an individual or group health care service plan to cover experimental or investigational treatments.

Cal. Ins. Code § 10123.196

(a) Every individual and group policy of disability insurance issued, amended, renewed, or delivered on or after January 1, 2000, that provides coverage for hospital, medical, or surgical expenses, shall provide coverage for the following, under the same terms and conditions as applicable to all benefits:

(1) A disability insurance policy that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration (FDA) approved prescription contraceptive methods, as designated by the insurer. If an insured's health care provider determines that none of the methods designated by the disability insurer is medically appropriate for the insured's medical or personal history, the insurer shall, in the alternative, provide coverage for some other FDA approved prescription contraceptive method prescribed by the patient's health care provider.

(2) Outpatient prescription coverage with respect to an insured shall be identical for an insured's covered spouse and covered nonspouse dependents.

(b) Nothing in this section shall be construed to deny or restrict in any way any existing right or benefit provided under law or by contract.

(c) Nothing in this section shall be construed to require an individual or group disability insurance policy to cover experimental or investigational treatments.

(d) Notwithstanding any other provision of this section, a religious employer may request a disability insurance policy without coverage for contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a

disability insurance policy shall be provided without coverage for contraceptive methods.

(1) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) Every religious employer that invokes the exemption provided under this section shall provide written notice to any prospective employee once an offer of employment has been made, and prior to that person commencing that employment, listing the contraceptive health care services the employer refuses to cover for religious reasons.

(e) Nothing in this section shall be construed to exclude coverage for prescription contraceptive supplies ordered by a health care provider with prescriptive authority for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for prescription contraception that is necessary to preserve the life or health of an insured.

(f) This section shall only apply to disability insurance policies or contracts that are defined as health benefit plans pursuant to subdivision (a) of Section 10198.5, except that for accident only, specified disease, or hospital indemnity coverage, coverage for benefits under this section shall apply to the extent that the benefits are covered under the general terms and conditions that apply to all other benefits under the

policy or contract. Nothing in this section shall be construed as imposing a new benefit mandate on accident only, specified disease, or hospital indemnity insurance.

(3)

No. 03-1618

Supreme Court, U.S.
FILED
AUG 3 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,

Petitioner,

v.

CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of California

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

California's Women's Contraceptive Equity Act requires providers of employer healthcare service plans and disability insurance plans to include coverage of FDA-approved contraceptives if the plan otherwise provides prescription drug coverage. This law does not apply to plans that are issued by insurers to "religious employers" as defined. The question presented is:

Does California's regulation of insurance providers violate the First Amendment because Catholic Charities of Sacramento, Inc., a non-profit public benefit corporation, would not come within the statute's "religious employer" exemption, if the corporation chooses to purchase a healthcare service plan that provides prescription drug coverage for its employees?

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STATEMENT

Petitioner Catholic Charities of Sacramento, Inc., seeks this Court's review of a decision of the California Supreme Court, which rejected petitioner's federal and state free exercise and establishment clause attacks against the Women's Contraceptive Equity Act (WCEA). The respondents, the State of California, the California Department of Managed Health Care, and the California Department of Insurance (State), respectfully request this Court to deny the petition.

A. The WCEA

In 1999, the California Legislature enacted landmark legislation to redress widespread discrimination against women employees in healthcare service plan coverage and in disability insurance policies. The WCEA[1] requires health care service plans and disability insurance policies that cover prescription drugs to include coverage for FDA-approved prescription contraceptives. Unless exempt, California employers who choose to offer their employees prescription drug coverage as part of a health or disability insurance plan must abide by the WCEA's contraceptive coverage mandates. However, the WCEA does not mandate employers to offer employees either health insurance, disability insurance, or prescription drug coverage.

The WCEA's legislative history demonstrates the long-standing discrimination against women employees nationwide in the exclusion of prescription contraceptive

[1] Cal. Stats. 1999, ch. 532, codified at Cal. Health & Safety Code § 1367.25 (West Supp. 2004); Cal. Stats. 1999, ch. 538, codified at Cal. Ins. Code § 10123.196 (West Supp. 2004).

coverage from their health benefit plans. Compelling, undisputed data establishes the adverse fiscal impact this form of discrimination has on women. Prescription contraceptives statistically are the most effective methods of birth control and are an essential part of women's healthcare during their reproductive years. 12 DA at A003337-A003342.[2] Nevertheless, prescription contraceptives are not included in 49 percent of health plan formularies, though most drugs approved by the Federal Drug Administration appear almost immediately on health plans. 3 DA at A000765. As a result, this exclusion is mainly responsible for women paying 63 to 68 percent higher out-of-pocket healthcare costs than men. 3 DA at A000764 and A000767; see also Pet. App. 89a.

The costs imposed on women by the historical health coverage exclusion for prescription contraceptive methods are not solely financial. The exclusion also directly threatens the health of California women. According to the American College of Obstetricians and Gynecologists, access to prescription contraceptives is a medical necessity for women due to the serious or even life-threatening consequences that can be caused by unintended pregnancies. 3 DA at A000846; see also Pet. App. 89a-90a.

B. The WCEA's Religious Employer Exemption

While the WCEA was pending before the California Legislature, the California Catholic Conference and the California Association of Catholic Hospitals approached the legislature and requested a "conscience clause" exemption

[2] Reference is to volume 12 of the Documentary Appendix that was before the state court of appeal and the California Supreme Court.

from the statute's requirements for Catholic employers. 3 DA at A000771. These organizations argued that the law would "force the Catholic Church to pay for a benefit that it believes is morally objectionable." 4 DA at A000887.

The California Legislature declined to enact as broad an exemption as the Catholic organizations demanded. The legislature realized that permitting non-profit corporations like Catholic Charities and the growing number of large hospitals and universities loosely affiliated with the Catholic Church to be exempt from the statute would deprive literally thousands of employees in California of access to nondiscriminatory health and disability insurance coverage. 5 DA at A001251-1252.[3]

Ultimately, the California Legislature did exempt religious employers from the WCEA. But the legislature defined the term "religious employer" more narrowly than petitioner would have preferred,[4] tracking a number of

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[3] Payroll data submitted by the California Association of Catholic Hospitals indicated that its member hospitals alone employ approximately 52,704 full-time positions. 5 DA at A001455.

[4] Cal. Health and Safety Code section 1367.25(b) provides:

> "Notwithstanding other provisions of this section, a religious employer may request a health care service plan contract without coverage for federal Food and Drug Administration approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for contraceptive methods.
>
> (1) For purposes of this section, a "religious employer" is an entity for which each of the following is true:
>
> (A) The inculcation of religious values is the purpose of the entity.
>
> (B) The entity primarily employs persons who share the religious tenets of the entity.

(Continued on following page)

federal and state labor and tax code exemptions.[5] The legislative history of the WCEA shows that the California Legislature intentionally and rationally narrowed the statute's exemption in order to assure that the broadest possible segment of the California female workforce would benefit from the statute's anti-discrimination mandates, while still respecting the free exercise interests of church employers. 4 DA at A000915.

C. Petitioner's Corporate Status

While petitioner represents itself as an "organ of the Catholic Church" and as "'ecclesiastically part of the Catholic Church,'" Pet. 2-3, it is nevertheless a non-profit public benefit corporation organized under the laws of California. Petitioner is not the Roman Catholic Bishop of Sacramento. Instead, it exists as a separately incorporated and administered organization. 2 DA at A000383.[6] Petitioner's chosen

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(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended."

[5] The WCEA's "religious employer" exemption is similar to the religious employer exemption provisions contained in the North Carolina (N.C. Gen. Stat. § 58-3-178(e)(1)-(3) (2000)) and Hawaii (Haw. Rev. Stat. § 431:10A-116.7) (2000)) statutory schemes that mandate insurance coverage for contraception. Moreover, this exemption's scope is similar to certain provisions contained in federal law. For example, some provisions of the Federal Tax Code (26 U.S.C. § 6033(a)(2)(A)(i) and (iii) (West 2002)) exempt certain tax filings for "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order."

[6] The Roman Catholic Bishop of Sacramento was not a party to the litigation, and there is no evidence that the WCEA burdens the free

(Continued on following page)

status as a secular, non-profit public benefit corporation allows petitioner to receive state funds and to enter into contracts with public agencies. 2 DA at A000384; see Cal. Const., art. XVI, § 5 (prohibiting grants of public funds "in aid of any religious sect, church, creed, or sectarian purpose").[7]

Petitioner does not qualify for the WCEA's religious employer exemption. Petitioner concedes that inculcation of religious values is not its purpose; that it does not primarily employ or service persons who share its religious tenets; and that it is not a non-profit religious organization within the provisions of Internal Revenue Code section 6033(a)(2)(A)(i) or (iii). 2 DA at A000387. In fact, most of petitioner's 183 employees are not Catholic, and the humanitarian services that it provides are offered without regard to the religious affiliation of the recipients. Pet. App. 92a.

D. The Proceedings Below

Petitioner filed a declaratory and injunctive relief action that challenged the constitutionality of the WCEA in the Superior Court of California, County of Sacramento. On September 28, 2000, the trial court denied petitioner's

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exercise of the Bishop's religion or interferes with the governance of the Diocese of Sacramento.

[7] California law alternatively permits incorporation as a non-profit religious corporation "primarily or exclusively for religious purposes." See Cal. Corp. Code § 9111 (West 1991). Such corporations, however, may be ineligible to receive grants of public funds. Cal. Const., art. XVI, § 5; see, *e.g.*, *Frohliger v. Richardson*, 63 Cal.App. 209, 214-217, 218 P. 497 (1923) (invalidating appropriation for restoration of San Diego Mission, title to which was held by the Archbishop of San Francisco).

motion for a preliminary injunction. Pet. App. 136a. The trial court held that petitioner failed to establish a reasonable probability of success on the merits that it would prevail on its constitutional claims. Pet. App. 137a-138a.

Following the trial court's denial of its motion for preliminary injunction, petitioner sought review by mandamus in the California Court of Appeal. In a unanimous opinion, the Court of Appeal denied Catholic Charities' petition. Pet. App. 87a-133a.

Petitioner sought review in the California Supreme Court. In a six-to-one opinion, the California Supreme Court affirmed the decisions of the lower courts. In its opinion, the court held that the WCEA does not unconstitutionally interfere with matters of internal church governance when it regulates employment relationships between a non-profit public benefit corporation and its employees. Pet. App. 8a-13a. Moreover, the court held that the WCEA's "religious employer" exemption does not violate the establishment clause because the exemption, in fact, constitutes a legislative accommodation of religious exercise that neither targets any religion nor involves the State in any excessive entanglement with religious beliefs. Pet. App. 13a-17a.[8]

The California Supreme Court also held that the WCEA does not violate the First Amendment's guarantee of free exercise of religion. In so holding, the court first

[8] Justice Kennard, concurring, observed that Catholic Charities' establishment clause claims are rendered moot by the organization's concession that it is not a religious entity exempt from federal taxation – a distinct requirement for exemption under the WCEA. See Pet. App. 50a-55a.

rejected petitioner's contention that the statute was subject to strict scrutiny notwithstanding this Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990). Pet App. 21a-35a. Petitioner had argued that (1) the WCEA was not a neutral statute of general application, (2) that the state legislature had "gerrymandered" the law to reach only Catholic employers, and (3) that *Smith* should not apply here because the WCEA violates so-called "hybrid" rights. The court rejected all of these contentions as unsupported in fact and law. Pet. App. 21a-35a.

Nevertheless, the state supreme court concluded that even if the WCEA were analyzed under this Court's pre-*Smith* strict scrutiny standard, see *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board, Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981), the statute would satisfy that standard. Pet. App. 40a-46a. The court applied the strict scrutiny standard for purposes of assessing whether the WCEA violated the California Constitution's free exercise guarantees. See Pet. App. 35a-40a. The court found that the WCEA serves the compelling state interest of eliminating gender discrimination in the provision of health benefits. Pet. App. 42a-46a. The court noted that "any exemption from the WCEA sacrifices the affected women's interest in receiving equitable treatment with respect to health benefits," Pet. App. 44a, and could find no case in which this Court had "exempted a religious objector from the operation of a neutral, generally applicable law, despite the recognition that the requested exemption would detrimentally affect the rights of third parties." *Id.* The court also found that no less restrictive alternatives are readily available because "[a]ny broader exemption increases the number of women affected by

discrimination in the provision of health care benefits." Pet. App. 45a.

Justice Brown, writing only for herself, dissented on the ground that *Smith* should be read to apply only to individuals and not to organizations. Pet. App. 59a-61a. Justice Brown concedes that the purpose underlying the WCEA is compelling, Pet. App. 57a, 73a, and she concedes that this Court's jurisprudence would likely support a conclusion that the WCEA serves a compelling state interest. Pet. App. 73a.[9] However, Justice Brown concludes that the statute is not "narrowly tailored" because (1) the scope of the religious employer exception could have been broader, Pet. App. 74a; (2) employers can avoid the anti-discrimination restrictions in health insurance policies by not purchasing health insurance plans for their employees, Pet. App. 74a-75a; and (3) notwithstanding the state legislature's determination, petitioner's female employees do not, in her view, constitute a sufficiently large part of the California workforce to justify equating their equal-employment interests under state law to petitioner's religious scruples, Pet. App. 71a n.5 and accompanying text ("[A]n exemption for Catholic Charities would seem to have a negligible effect."), Pet. App. 75a ("[T]he record provides no support for the claim that the exemption potentially affects several hundred thousand employees"); see also Pet. App. 79a ("The insurance gap itself is not

[9] It is undisputed in the record that women spend as much as 68% more than men for out-of-pocket health care costs, and that this is due in part to the costs associated with prescription contraceptives and unintended pregnancies. Pet. App. 42a-43a. According to various legislative staff reports, eliminating this economic inequality in health insurance coverage was the WCEA's "principal object." Pet. App. 43a.

large, and Catholic Church employers can constitute only a small percentage of that small percentage.")[10]

REASONS FOR DENYING THE PETITION

THE PETITION PRESENTS NO GROUNDS JUSTIFYING REVIEW BY THIS COURT

A. The Decision Below Affects Only California Non-Profit Public Benefit Corporations Organized for Secular Purposes; It Has No Application to Any Non-Profit Corporation That Is Organized as a Church or Otherwise Primarily for Religious Purposes.

Petitioner vaguely represents itself as an "organ of the Catholic Church" and as "'ecclesiastically part of the Catholic Church.'" Pet. 2-3. Nevertheless, petitioner is a corporation which chose to organize itself under California law, not as a non-profit religious corporation, 2 DA at A000383, but rather as a non-profit "public benefit corporation," see Cal. Corp. Code § 9111 (West 1991). As noted above, petitioner's secular corporate status enables the corporation to receive public funding and to enter into contracts with public agencies. See Cal. Const., art. XVI, § 5. Furthermore, petitioner concedes that it is not exempt from federal taxation as a "church[], [an] integrated auxiliary [of a church], [or a] convention[] or association[] of [a] church[]" under 26 U.S.C. § 6033(a)(2)(A)(i). Pet. App. 6a.

[10] Justice Brown did not indicate her acceptance of petitioner's claims of interference with "hybrid rights," interference with "religious autonomy," or "compulsory subsidization." These claims of petitioner, accordingly, enjoyed no support at all from the court below.

Petitioner's exemption under 26 U.S.C. § 6033(a)(2)(A)(i) would not, standing alone, suffice to qualify petitioner for an exemption as a "religious employer" under the WCEA. See n.4. But neither does the decision below purport to decide whether the WCEA would violate the First Amendment rights of an organization that, unlike petitioner here, was organized as a non-profit religious corporation under California law or that did qualify as a church, an integrated auxiliary of a church, or a convention or association of a church under 26 U.S.C. § 6033(a)(2)(A)(i). Pet. App. 17a; see also Pet. App. 54a-55a (Kennard, J., concurring).

Indeed, the decision below does not purport to determine the free exercise rights of an organization that satisfies any one, but not all, of the criteria for an exemption under the WCEA. For example, a closer question might be presented by a corporate employer that claims no federal tax exemption as a church or church affiliate, but alleges, nevertheless, that the inculcation of religious values is its organizational purpose. See Cal. Health & Safety Code § 1367.25(b)(1)(A) (West Supp. 2004). And a closer question might be presented by a case involving a dispute whether the persons primarily served by the employer share the religious tenets of the entity. See Cal. Health & Safety Code § 1367.25(b)(1)(C) (West Supp. 2004). But no such questions arise in the context of this case.[11] Here, petitioner readily concedes that inculcation of religious values is not its purpose and, indeed, petitioner

[11] Petitioner complains that the WCEA's definition of a religious employer "invites intrusive and subtly coercive scrutiny that is itself offensive to the First Amendment." Pet. App. 27. But petitioner *conceded* that it is not a religious employer within the meaning of the statute. The objection is, thus, hypothetical at best.

distinguished its purpose from that of inculcation of religious values: "*Rather*, [petitioner's] purpose . . . is to offer social services to the general public . . . , to reduce the causes and results of poverty, and to build healthy communities through social service programs . . . " Pet. App. 6a (italics added).[12]

The decision below is, on its face, limited in its impact to corporate employers that, like petitioner here, prefer to claim state and federal tax exemptions as secular charities or "public benefit" corporations, rather than as religious institutions – in part, at least, so that they will be eligible for receipt of taxpayer monies. While respondents do not contend that such secular non-profit corporations are wholly without free exercise protections, respondents do contend that, to the extent that the decision below affects only such entities, the decision does not warrant this Court's review.

B. The Petition Does Not Otherwise Present Any Basis for this Court's Review.

1. Petitioner's request for guidance concerning the application of *Smith* raises essentially a moot point.

Petitioner asserts that this Court needs to "clarify the meaning and scope" of its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) (*Smith*). Pet. 8-9. But petitioner raises what is, for all intents and purposes, a moot point. The state supreme court expressly concluded that,

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[12] Petitioner's stated purpose is similar to the stated purpose of the American Red Cross. See http://www.redcross.org/more/commserv (setting forth that organization's community services).

even if *Smith* did not govern, and even if this Court's pre-*Smith* strict scrutiny standard were applicable, the WCEA would satisfy that standard. Pet. App. 40a-46a.

There is, accordingly, no need to clarify whether the Court's pre-*Smith* strict scrutiny standard should apply; it was applied.

2. Petitioner's assertion that the WCEA is not a "law of general applicability" is patently without merit.

Petitioner seeks this Court's "guidance" about whether the WCEA is a "law of general applicability" within the meaning of *Smith*. Pet. 11. But petitioner does not – cannot – dispute that the WCEA applies to all providers of employee health insurance plans that include prescription medication coverage.

Instead, petitioner's asserted need for "guidance" rests on the fact that the statute does not require employers to purchase prescription coverage in their employee health insurance plans and because the statute exempts "religious employers." Pet. 11-12. This asserted basis for certiorari is manifestly specious.

3. Petitioner's asserted claim of interference with associational rights was not raised or considered by the court below.

Petitioner asserts that the WCEA interferes with the First Amendment associational rights of its supporters and contributors. See Pet. 12-13. But petitioner did not allege interference with any associational rights in the proceedings below, and, accordingly, the state supreme

court did not address the issue. See Pet. App. 32a ("The other rights violated, Catholic Charities asserts, are those protected by the free speech and establishment clauses of the First Amendment"); see also, Pet. App. 111a-112a (asserted "hybrid rights" relate to free speech and establishment clause). This Court will not entertain claims that were not raised and determined in the courts below. 28 U.S.C. § 1257(a) (West 1993) (challenge to validity of state statute must have been "drawn in question"); see also *Cardinale, Jr., v. Louisiana*, 394 U.S. 437, 439 (1969).

4. Petitioner's asserted claim of interference with speech is unsupported by the evidence.

To the extent that petitioner claims that the WCEA interferes with petitioner's speech, Pet. 15-16, the court below noted that this claim was unsupported by any evidence. The court declined to accept petitioner's argument that compliance with the law amounts to "speech":

> Catholic Charities' compliance with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them. For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen [as] a statement of support for the law or its purpose. Such a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition.

Pet. App. 34a-35a (citation omitted); see also Pet. App. 113a.[13]

5. Petitioner's assertion that the WCEA interferes with the institutional autonomy of the church is manifestly unsupported in fact and law.

Petitioner seeks review because the WCEA interferes with "the institutional autonomy of the Church." Pet. 17. The contention was properly rejected by the court below. Assuming for purposes of analysis that petitioner would qualify as a "church" under this Court's "religious autonomy" jurisprudence, the state supreme court carefully analyzed the issue and concluded that petitioner had shown no interference with religious autonomy. Pet. App. 8a-13a.

But, perhaps more relevant for purposes of assessing the need for this Court's review of that analysis, petitioner has shown nothing in this Court's jurisprudence, or in the decisions of any Court of Appeals, that would support its claim to being "a church" or "the Church" for purposes of "religious autonomy" analysis in any event. As noted above, petitioner has deliberately chosen to organize itself under California law as a secular non-profit public benefit corporation rather than as a non-profit religious corporation. See Cal. Corp. Code § 9111 (West 1991). Petitioner concedes that it is not exempt from federal taxation as a church, an integrated auxiliary of a church, or a convention or association of a church under 26 U.S.C.

[13] On this point, the Justices below appear to be unanimous. See note 10, supra.

§ 6033(a)(2)(A)(i). Pet. App. 6a. Further, petitioner is not the Bishop of the Diocese of Sacramento. See Pet. 3 (petitioner is "separately incorporated and a distinct civil entity."). The Bishop was not a party to this litigation, and no evidence exists in the record to establish that the WCEA interferes with the Bishop's institutional autonomy. Accordingly, this asserted basis for petitioning this Court likewise fails for manifest lack of merit.

6. Petitioner's "compulsory subsidization" claim is patently specious.

Petitioner claims that the WCEA impermissibly forces it to subsidize non-governmental conduct that is contrary to the "church's moral code." Pet. 19. This is a variation of petitioner's free speech and free association claims; it is factually unsupported and manifestly without merit.

Petitioner necessarily concedes that, like all other employers, petitioner is *not* required by the WCEA to purchase prescription medication coverage in the health benefit plans it provides for its employees. See e.g., Pet. 11 (noting that the act permits employers to deny prescription drug coverage altogether); see also Pet. App. 2a ("The WCEA does not require any employer to offer coverage for prescription drugs."); Pet. App. 75a (Brown, J., dissenting) (recognizing the employers can self-insure rather than purchase healthcare benefit plans).

To the extent that petitioner is "compelled" at all to purchase prescription medication coverage in its employee health plans, that compulsion is solely a result of petitioner's own *corporate*, if religiously motivated, business choices. It cannot reasonably be said to result from any *statutory* mandate.

7. Petitioner's claim that the WCEA defines the limits of petitioner's religious expression exaggerates the true facts.

Petitioner asserts a need for "clarification" of the State's power "to judge whether a church entity is sufficiently religious to exercise its religion freely." Pet. 24. But it is evident that no such "clarification" is required, for the simple reason that the State has nowhere purported to decide whether petitioner is "sufficiently religious to exercise its religion freely." *Id.*

The California Legislature has endeavored to alleviate a burden on the free exercise of religion consistent with meeting the legitimate state purpose of maximizing the number of women protected by the statutes' anti-discrimination provisions. Such permissible legislative balances, see *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 334-335 (1987) (Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion), will exclude some entities whose operations are motivated in whole or in part by religious belief while including others. See *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784-785 (1981) (concluding that Congress intended to exempt from unemployment tax obligation employees of a parochial school that had no separate legal existence from the church); *cf. Lutheran Social Service of Minnesota v. United States,* 758 F.2d 1283, 1287 (8th Cir. 1985) (social service agency was not a church within meaning of 26 U.S.C. § 6033(a)(2)(A)(i) and, hence, it was not entitled to exemption from tax-filing requirement on that ground).

Petitioner's exclusion from the "religious employer" exemption of the WCEA is a function of, among other things, petitioner's choice not to seek exemption as a religious institution under federal tax laws, 26 U.S.C. § 6033(a)(2)(A)(i) or (iii). It is manifestly not a statement about the "sufficiency" of petitioner's religiosity. *Cf. Equal Employment Opportunity Comm'n v. Townley Engineering Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1988) ("We do not question the sincerity of the religious beliefs of the owners of Townley. Nor do we question that they regard the conduct of their company as subject to a compact with God. We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702 [of Title VII].").

8. No split among circuit or state supreme courts exists to justify this Court's intervention.

Many states, including New York, New Jersey, Maryland, Massachusetts, Virginia, and Texas, have adopted anti-discrimination statutes that are similar to the WCEA. 4 DA at A000946-A000947. Petitioner acknowledges that such statutes exist across the country. Pet. 9. The California Supreme Court is the only state high court to address the constitutional claims to date, however, a virtually identical matter is currently pending in the New York appellate courts. *Catholic Charities of the Diocese of Albany, et al. v. Serio*, Supreme Court, Albany County (Index No. 8229-02).

Given that the California Supreme Court's ruling presently affects only secular corporations that receive

government funding and decline even to claim exemption as religious institutions under state or federal tax laws, and given the current absence of conflicting analyses among state or federal courts concerning the constitutional claims advanced by petitioner, this Court's involvement is presently unwarranted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: August 3, 2004

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Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The principal theme of California's Brief in Opposition is that Catholic Charities is in a predicament of its own choosing—that it chose to incorporate as a public benefit corporation, thereby undermining its claim to religious freedom, and that it chose to provide prescription drug coverage, thereby exposing itself to the State's contraceptive coverage mandate. But the State cannot so easily avoid responsibility for its own choice to disregard the rights that Catholic Charities unquestionably possesses in this case. There is nothing about Catholic Charities' choices here that forecloses its claim to the protection of the First Amendment, that diminishes the importance of the question presented in the Petition, or that affects the resolution of that question.

The most striking aspect of California's Brief in Opposition is its complete lack of response to the central question presented in the Petition—whether compelling Catholic Charities, an arm of the Catholic Church, to include contraceptives in its voluntary prescription drug plan amounts to compelled subsidization and endorsement of contraceptive use in violation of the free exercise and free speech provisions of the First Amendment. That is a question that warrants a response from the State and the attention of this Court.

I. CATHOLIC CHARITIES IS ENTITLED TO THE FULL PROTECTION OF THE FIRST AMENDMENT.

The State of California concedes that Catholic Charities is not "wholly without free exercise protections." Respondents' Brief in Opposition ("Br. Opp.") 11. In the State's view, however, those rights are somehow diminished—or at least less worthy of this Court's attention—because Catholic Charities is incorporated as a "public benefit corporation" under California law and, as such, is eligible to receive state support for its charitable activities. As the Supreme Court of California has made clear, however, a "religious entity" with "religious" purposes may choose to incorporate either as a "nonprofit religious corporation" or as a "nonprofit public benefit corporation." *McKeon v. Mercy Healthcare Sacramento*, 965 P.2d 1189, 1192, 1194 n.2 (Cal. 1998) (hospital organized as a public benefit corporation eligible for exemption as a "religious entity" under state fair employment law); *see also Kelly v. Methodist Hospital*, 997 P.2d 1169 (Cal. 2000) (same). Catholic Charities has chosen to incorporate as a nonprofit public benefit corporation and to seek State funds to assist in the provision of its secular services. But those facts do not affect the merits or importance of this case, as the

State suggests. To the contrary, the State's suggestion itself raises important questions.

Does a church-related entity that provides secular services have to isolate itself entirely from the government, which shares an interest in the provision of those services, in order to maintain its religious identity? Must it choose to be *either* secular *or* religious? Or can it maintain a set of religious beliefs and simultaneously cooperate with the government in the provision of needed secular services—contracting with the government and receiving financial assistance from the government to provide those services?

The answer to these questions is important not only to organizations such as Catholic Charities, but also to the community at large. Providing for the social welfare of those in need in every corner of the land is an extraordinarily complex undertaking. It requires the cooperative efforts of countless institutions, public and private, religious and non-religious. Catholic Charities and institutions like it are important contributors to this overall effort. And it disserves not only those institutions, but also the millions they serve, to force such institutions to choose between maintaining their religious identities and providing needed secular services. *See Kelly v. Methodist Hospital*, 997 P.2d at 1178 ("Healthcare is a social service that historically has been associated with religious groups.").

In an attempt to minimize the importance of this case, California argues that it "[a]ffects [o]nly" nonprofit "public benefit corporations" under California law, not nonprofit "religious corporations." Br. Opp. 9; *see* Cal. Corp. Code §§ 5110, 9110. That argument, however, is wrong on two counts. First, neither the WCEA's exemption nor the California Supreme Court's opinion turns on an entity's status under California's Nonprofit Corporation Law. Entities that are incorporated as "religious corporations" are also covered by the State's contraceptive mandate, unless they meet the

four criteria for exemption under the WCEA—including the requirements that they exist to inculcate religious values, and that they serve and employ primarily those who share their religious tenets.[1] Catholic Charities would not qualify for the exemption even if it had chosen to incorporate as a nonprofit religious corporation. The distinction between "religious" and "public benefit" nonprofit corporations is thus a red herring in this case.[2]

Second, even if this case affected "only" public benefit corporations, its effect would be far-reaching. There are countless church-related universities, hospitals and other entities that fall into that category and that perform important educational and social services, in part with the support of public funds. Those institutions do not surrender their free exercise rights altogether by incorporating as nonprofit public benefit corporations under California law and maintaining their eligibility for State funds.

To be sure, a church-related institution that receives public funds subjects itself to restrictions on the use of those funds. *See, e.g., Roemer v. Maryland*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971). But this case does not involve the expenditure of public funds. It involves the expenditure of private funds. There is simply no basis for California's suggestion that a church-related institution that accepts public support for its secular charitable activities can be forced to spend its own money in support of *unrelated* activities that violate its religious beliefs. *Cf. Rust v. Sullivan*,

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[1] Notwithstanding its denial, Br. Opp. 16, California has unquestionably decided that entities that do not meet those criteria are not "sufficiently religious to exercise [their] religion freely."

[2] Whether Catholic Charities sought exemption from federal tax *filing* as a "church[]" or "integrated auxiliar[y]," 26 U.S.C. § 6033 (a)(2)(A)(i), is also irrelevant to the First Amendment issues in this case. It is exempt from the *payment* of taxes as an organization with "religious" and "charitable" purposes. 26 U.S.C. § 501(c)(3).

500 U.S. 173, 196-98 (1991) (provider of family planning services may be prohibited from spending federal funds on abortion-related activities, but is free to spend its own funds on those activities); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (government may not prohibit public broadcasting station that received federal funds from using private funds to editorialize). A church-related university does not waive its right to spend its own money on chapel services by accepting public money to build a science lab. Likewise, Catholic Charities does not waive its right to spend its own money in accordance with its religious beliefs by accepting public money to support secular welfare services.

II. THE WCEA VIOLATES CATHOLIC CHARITIES' FREE EXERCISE AND FREE SPEECH RIGHTS.

California offers no response to the petitioner's legal argument that it violates the First Amendment protections of free speech and free exercise to compel a church-owned organization to subsidize activities that violate the teachings of the sponsoring church. The State argues simply that as a factual matter Catholic Charities can avoid the coercion by dropping the prescription coverage it offers to its employees. But why should Catholic Charities be forced to deny a benefit to its employees in order to assert its religious beliefs—in particular, a benefit that the Church teaches it is required to provide? The fact is that Catholic Charities, having chosen to provide prescription drug benefits in accordance with its religious beliefs, has been compelled to subsidize contraception in violation of its religious beliefs. Whether that violates Catholic Charities' religious and expressive rights under the First Amendment is an important question on which this Court's guidance is needed.

In the Petition, Catholic Charities cited this Court's "expressive association" cases, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995), in support of its argument that the First Amendment protects against compelled action that interferes with an organization's chosen message—even compelled action intended to advance the state's interest in eliminating discrimination. *See* Petition at 12-15, 19-20. California argues that Catholic Charities may not rely upon those cases, because it did not assert a separate right-of-association claim in the Supreme Court of California. Br. Opp. at 12-13. It is undisputed, however, that Catholic Charities asserted claims below that the WCEA violates not only its right of free exercise but also its right of free speech. App. 31a-35a. Nothing prevents Catholic Charities from citing the expressive association cases in support of that free speech claim. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Catholic Charities' citation to this Court's expressive association cases is well within this traditional rule.

The expressive association cases provide a useful analogy to this case. They recognize the right of organizations to choose their message and to avoid forced *associations* that compromise their message. This case involves the right of a church organization to choose its message and to avoid forced *subsidization* that compromises that message. Catholic Charities did not assert a separate right-of-association claim, because the State has not, as in the *Boy Scouts* and *Hurley* cases, compelled an organization to associate with anyone it chose to exclude. The claim here is that the State has interfered with a religious organization's expressive rights in a different, even more offensive, way—by forcing the direct subsidization of conduct that it condemns.

To pay for contraceptives is to condone their use, and for any arm of the Catholic Church to condone the use of contraceptives is to contradict the Church's message that such use is wrong. It is difficult enough for a Church and its affiliated institutions to stand squarely behind such an unpopular and inconvenient religious message. The State of California has made it impossible for Catholic Charities to do so.

This case presents a question that is in some ways the flip side of the question that was posed in the Court's abortion and contraception cases. *E.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Those cases can be seen as standing for the proposition that those who believe abortion and contraception are morally wrong may not impose those beliefs upon those who disagree, because to do so invades a sphere in which those individuals enjoy implicit constitutional protection. This case presents the Court with an opportunity to clarify that the converse is true—that those who regard abortion and contraception as morally acceptable may not impose those beliefs upon a church organization that disagrees, because to do so invades a sphere in which the church enjoys explicit constitutional protection. The need for that clarification is apparent, given the prevalence of laws such as the one at issue here.

III. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY *EMPLOYMENT DIVISION V. SMITH.*

California argues that there is no occasion to clarify whether the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), governs—or whether, instead, the compelling state interest test applies—because the Supreme Court of California held in the alternative that the compelling state interest test was satisfied. But petitioner has asked the Court to review that determination as well. As explained in the Petition, *how* strict scrutiny applies in a case like this is a

question no less important than *whether* it applies. *See* Petition at 21-23.

1. Whether strict scrutiny applies depends in part on what the Court meant in *Smith* by a law of "general applicability." Is this a law of general applicability because it applies to all providers of health insurance plans who choose to provide prescription drug coverage? Or is it something less than a law of general applicability, because it permits employers to deny prescription drug coverage altogether and allows some religious employers to exclude contraceptives from prescription plans that they choose to offer?

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), this Court held that ordinances prohibiting certain animal killings were not laws of general applicability, because they were substantially "underinclusive"—that is, because they failed to prohibit killings that endangered the asserted interests in public health and preventing cruelty to animals "in a similar or greater degree" than the prohibited killings. *Id.* at 543-44. The WCEA is far more underinclusive: it allows employers unilaterally to opt out altogether from the provision of prescription drug coverage. This aspect of the WCEA substantially undermines the State's asserted interests in providing contraceptive coverage and eliminating the disparity in the healthcare expenses of men and women. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (subjecting police policy against beards to heightened scrutiny because of medical exception undermining the asserted interest in fostering a uniform appearance).

In short, this is not a law of general applicability, because the State has identified no benefit so important that employers should generally be required to provide it. To that argument, the State has no response.

2. Whether strict scrutiny applies also depends on how the *Smith* Court's discussion of "hybrid" claims is interpreted and applied. There is a conflict among the Circuits, unaddressed by the State, on how to interpret that discussion. *See* Petition at 12 n. 4. And there is, as noted above, an important hybrid free-speech claim in this case.

3. The applicable level of scrutiny also depends on whether this case implicates considerations of church autonomy. California argues that such considerations are irrelevant because Catholic Charities is not a church or "religious corporation" under California law. Regardless of its status under California's Nonprofit Corporation Law, however, Catholic Charities is "ecclesiastically part of the Catholic Church," under the sole direction and authority of the Bishop of Sacramento. 13 Cal. App. A003743; 2 Cal. App. A000340, A000383. That the Bishop has chosen to carry out part of the Church's religious mission through a separate legal entity does not eliminate the considerations of church autonomy that this Court has recognized. How the Church structures and governs itself—and, in this case, how it defines its relationship to those who carry out its mission—are essential elements of Church autonomy. Whether the presence of these institutional considerations provides still another basis to distinguish *Smith*, which involved only an individual claim, is also an important question. *See* Petition at 17-19.

4. Finally, *how* strict scrutiny applies in a case like this one—which presents not a conflict between religious freedom and the public welfare, but instead a "clash of ideas," *see* Petition at 22-23—is an important question upon which the Court's guidance is needed. On one side of this dispute is the Church's idea—itself nondiscriminatory—that contraceptive use by men and women is wrong. On the other side is the State's idea that even this facially nondiscriminatory belief has a disproportionate impact upon women. The ultimate question in this case, as noted in the Petition, is whether the

State's interest in enforcing its idea of gender equity is more important than its obligation to respect the religious beliefs of the Church and the right of the Church's institutions to maintain their doctrinal integrity.

The California Supreme Court answered that question in the affirmative, reciting simply that there is a compelling state interest in "eliminating gender discrimination." App. 42a. As this Court emphasized in the *Boy Scouts* and *Hurley* cases, however, that is not an adequate answer when expressive rights are substantially infringed. *See* Petition at 19-20. It is even more obviously inadequate when applied, as here, to a policy that itself draws no distinctions on the basis of gender. Whether California can override Catholic Charities' free speech and free exercise rights in this case by attaching the "pejorative label" of discrimination[3] to the Church's gender-neutral teachings is an important question. It is important to Catholic Charities, to the numerous institutions that are affected by laws such as California's, and to the sensible development of the law in this difficult and oftentimes confusing area.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[3] Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood,* 28 Pepp. L. Rev. 641, 651-52 (2001), *quoted in* Petition at 23 n.11.

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On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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No. 03-1618

IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,
v.
CALIFORNIA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICUS CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief as *amicus curiae* in support of Petitioner pursuant to Rule 37.2 of this Court.[1]

The Becket Fund for Religious Liberty is an interfaith, nonpartisan, public-interest law firm dedicated to protecting the free expression of all religious traditions, and

1 All parties have consented to the filing of this brief, and their letters of consent have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

the equal participation of religious people in public life and public benefits. The Becket Fund litigates in support of these principles in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*. Accordingly, the Becket Fund is frequently involved in litigation on behalf of religious individuals and institutions seeking relief under the Free Exercise Clause from governmental burdens on religious exercise.

The Becket Fund believes that its experience in this area of the law will enable it to aid the Court in understanding the extent of division – indeed, fragmentation – among the lower courts regarding the meaning of "hybrid" rights under the Free Exercise Clause, and so in deciding whether to grant the writ in this case.

SUMMARY OF THE ARGUMENT

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court first articulated the concept of "hybrid rights" in Free Exercise jurisprudence. Almost fifteen years later, the lower courts continue to interpret this concept in wildly disparate ways. Some have applied it as a meaningful exception to the general rule that incidental burdens on religious exercise, however substantial, do not trigger strict scrutiny. Others have defiantly refused to apply the concept at all, rejecting it as incoherent. Still others fall at various points in between.

Fifteen years is more than fair opportunity for the lower courts to sort out this issue for themselves. Indeed, allowing more time has only led to deeper division, as the decision below from the California Supreme Court exemplifies. The Court should therefore grant the writ and bring some long-overdue clarity to this especially confused and confusing area of free exercise jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S REVIEW IS NEEDED TO RESOLVE CONFUSION AMONG THE LOWER COURTS REGARDING THE MEANING OF "HYBRID RIGHTS."

'Tis no sinister nor no awkward claim,
Pick'd from the worm-holes of long-vanish'd days,

WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, act II, sc. 4.

In *Smith*, this Court announced the general rule that laws burdening religious exercise do not trigger strict scrutiny if they are "neutral" and "generally applicable." But *Smith* expressly noted a category of cases, such as *Wisconsin* v. *Yoder* and *Cantwell* v. *Connecticut*, where the Court *has* applied strict scrutiny to burdens imposed by neutral and generally applicable laws. *Smith* did not overrule these cases, but instead distinguished them as "hybrid situations" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Id.* at 881-82 (citations omitted).

While this concept of "hybrid rights" may have been helpful to explain past cases, it has been a source of confusion – still proliferating after almost fifteen years – among the lower courts in deciding subsequent cases. In particular, the federal Courts of Appeals and state Supreme Courts differ widely on the question of how strong the companion constitutional claim must be in order to fall within the "hybrid rights" exception.

A. Some Lower Courts Have Repudiated the Concept of "Hybrid Rights" Entirely.

The Second Circuit has rejected the concept of hybrid rights as "dicta . . . not binding on this court," even though that decision put the court at odds with a majority of the other Courts of Appeals. *Knight* v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *accord Leebaert* v. *Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003). The Sixth Circuit has been the only other court to reject the hybrid rights principle so explicitly, calling it "completely illogical" and holding that, "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause." *Kissinger* v. *Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993); *accord Prater* v. *City of Burnside*, 289 F.3d 417 (6th Cir. 2002).

Although the First Circuit has not rejected the "hybrid rights" concept entirely, it appears to have rejected one part of it that *Smith* specifically identified. In *Brown* v. *Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), the First Circuit examined a hybrid claim that a mandatory sex education program at a public high school burdened the free exercise of religion *and* the right of parents to direct the education of their children. Although *Smith* specifically identified the right "to direct the education of their children" as a right that had successfully been asserted in conjunction with a free exercise claim, 494 U.S at 882, the First Circuit concluded that "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." 68 F.3d at 533.

B. Some Lower Courts Have Required an Independently Sufficient Constitutional Violation to Qualify for the "Hybrid Rights" Exception to *Smith*.

Four federal circuits have required a plaintiff to establish a constitutional violation that would stand alone, even apart from the plaintiff's free exercise claim, in order to trigger strict scrutiny as a "hybrid right." Although this interpretation is not as expressly defiant as that adopted by the Second and Sixth Circuits, it has the same effect of rendering the doctrine meaningless.

In *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), the Seventh Circuit rejected the plaintiffs' hybrid rights claim because the companion claims "*individually* lack[ed] the merit necessary to withstand summary judgment." *Id.* at 765 (emphasis added).[2]

In *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the plaintiff made a hybrid claim involving a free exercise claim accompanied by a free speech claim. But the Third Circuit first examined the religiously-motivated action as a separate free speech claim and found that it could not be "deemed expressive conduct." In the absence of an independently sufficient free speech claim, the court concluded that the plaintiffs did not "assert such a 'hybrid rights' claim." *Id.* at 161 n.26.

Similarly, the D.C. Circuit found a successful hybrid rights claim, but only after determining that the plaintiff

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2 In this decision, the Seventh Circuit cites to a Ninth Circuit opinion on hybrid rights. *Id.* at 765 (citing *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)). However, the standard that the Seventh Circuit actually applies appears stricter than the "colorable" standard enunciated by the Ninth Circuit.

established an additional, independently meritorious constitutional claim. *E.E.O.C.* v. *Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996). The court found that the EEOC's attempt to apply Title VII to a religious university in its decision whether to promote a professor of Canon Law violated the Establishment Clause, because that enforcement would "excessively entangle the government in religion." *Id.* 468. The court concluded that, "[a]s a consequence, this case presents the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause even if our earlier conclusion that [the E.E.O.C.'s enforcement violates the Free Exercise Clause on other grounds] should prove mistaken." *Id.*

Similarly, in *Brown* v. *Hot, Sexy & Safer Productions, supra,* the First Circuit has rejected a hybrid rights claim, because the free exercise claim was "not conjoined with an *independently protected* constitutional protection." 68 F.3d at 539 (emphasis added); *accord Gary* v. *Manchester*, No. 03-1211, 2004 U.S. App. LEXIS 13593, at *4 (1st Cir. July 1, 2004) (rejecting hybrid claim because free exercise was "not linked to a *separate* constitutional claim").

C. Some Lower Courts Have Required a "Colorable" Claim of a Constitutional Violation to Qualify for the "Hybrid Rights" Exception to *Smith*.

The Ninth and Tenth Circuits have adopted a looser, "colorable" standard in an attempt to avoid the redundancy of the stricter standard. Both courts have explained that this means "that the plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits." *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004). *Accord Miller* v. *Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999); *San Jose Christian College* v. *City of Morgan Hill*,

360 F.3d 1024 (9th Cir. 2004). The Ninth Circuit has added that the colorable standard is analogous to the "likelihood of success on the merits" standard for preliminary injunctions. *Thomas* v. *Anchorage Equal Rights Comm'n*, 165 F.3d 692, 705-06 (9th Cir. 1999), *vacated on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc).

D. Some Courts Have Left Ambiguous How Strong a Companion Claim Must Be to Qualify for the "Hybrid Rights" Exception to *Smith*.

The remaining appellate courts to address the meaning of "hybrid rights" simply defy categorization. Some provide vague guidance on the meaning of the term, while others merely recite the relevant language from *Smith*, and then decide – without an apparent, principled basis – whether to apply strict scrutiny.

In *City Chapel Evangelical Free Church* v. *City of South Bend*, 744 N.E.2d 443 (Ind. 2001) (plurality), the Supreme Court of Indiana addressed the question of hybrid rights in a case where the free exercise claim was paired with an expressive association claim. A plurality concluded that in order "to qualify for this hybrid claim exception," the plaintiff must demonstrate that the government action would both "(1) *significantly affect* or burden its members' right to expressive association and (2) *substantially burden* a religious practice." *Id.* at 454 (emphasis added). Two dissenting justices took a narrower view of hybrid rights, arguing that the plaintiff's claim was not even potentially hybrid. "[A] hybrid claim requires at least something more than collective religious exercise to add a right of association to the religious exercise rights of the complainants." *Id.* at 458 (Boehm, J., dissenting); *accord id.* at 454-55 (Shepard, C.J., concurring in part and dissenting in part).

The New York Court of Appeals has required that "discrete" constitutional claim must also be "implicated" to qualify as a hybrid right. In *New York State Employment Relations Board* v. *Christ the King Regional High School*, 682 N.E.2d 960 (N.Y. 1997), the court considered a private school's appeal from a requirement that the school bargain with a labor union. The court rejected the argument that the "application of the State Labor Relations Act to it would interfere with the fundamental rights of parents of students to direct the religious education of their children." *Id.* at 964. The court explained that

> *Smith* did not intend its hybrid exception to turn back on itself in circumstances such as this singularly generic First Amendment setting and circumstance. Rather, the Court expressly referenced the hybrid exceptional situations to free exercise settings in which other *discrete constitutional protections* are also implicated.

Id. (emphasis added) (citations omitted). Thus it held, "[A]ppellant's free exercise claim, invoked with sweeping, threshold cloakage, cannot prevail." *Id.*

The Supreme Court of Washington found a hybrid situation triggering strict scrutiny, but no apparent basis other than the "in conjunction with" language of *Smith* itself. In *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 182 (Wash. 1992) (en banc), the court examined the municipal landmark designation of a church and found that the church's exterior was "freighted with religious meaning," so that "regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech." *First Covenant*, 840 P.2d at 182. Thus, "the church's claim is 'hybrid' because designation not only violates First Covenant's right to freely exercise religion, it infringes on First Covenant's right to free speech." *Id.*;

accord First United Methodist Church of Seattle v. *Hearing Examiner for Seattle Landmarks Pres. Bd.*, 916 P.2d 374 (Wash. 1996).[3]

The Supreme Courts of Michigan and Vermont have applied strict scrutiny – both where parental rights in the education of children were involved – without any meaningful examination of the strength of the companion claim. The Michigan Supreme Court simply stated that, "In [*Smith*], the Court ruled that the 'Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their children' demands the application of strict scrutiny. Hence [the state law] must undergo strict scrutiny to survive a free exercise challenge." *People* v. *DeJonge*, 501 N.W.2d 127, 134-35 (Mich. 1993) (citing *Smith*, 494 U.S. at 881) (other citations omitted). The Supreme Court of Vermont concluded that, "In the lexicon of [*Smith*], this is a 'hybrid situation' implicating more than a free exercise claim and, thus, the State must show more than that the truancy law is of general applicability and is valid and neutral." *State* v. *DeLaBruere*, 577 A.2d 254, n.8 (Vt. 1990).[4]

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3 Notably, the court emphasized its refusal to rest its decision exclusively on federal grounds, because of its desire to "eschew the uncertainty of [*Smith*]," and especially its confusing concept of hybrid rights. *First Covenant*, 840 P.2d at 185.

4 The court still expressed doubt as to the proper scrutiny to apply, illustrating the confusion surrounding the hybrid rights language of *Smith*. In contradiction to its earlier classification of the claim as hybrid, the court remarked, "The recent opinion in *Smith* appears to direct that the State, in this case, need meet only a reasonable relationship standard." *Id.* at n.10 (citation omitted). The court concluded, however, "Since we find that the State has shown a compelling state interest, we would necessarily also find that the State has met the lesser burden of *Smith*." *Id.*

Finally, the Eighth Circuit has been similarly superficial in acknowledging and applying strict scrutiny on a hybrid rights theory without meaningful explanation. In *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the court emphasized that its "reversal of the summary judgment [against the church's companion claims] breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim on remand." *Id.* at 473. However, the court failed to give the district court any discernable standard by which to judge whether the companion claims were strong enough to achieve hybrid status.

II. THE DECISION BELOW EXEMPLIFIES AND COMPOUNDS THE EXISTING CONFUSION REGARDING "HYBRID RIGHTS."

In approaching the question of "hybrid rights" in the decision below, the California Supreme Court noted the disparity among other courts addressing that question, as well as the practical risks associated with interpretations at either extreme. It rejected the "colorable" standard of the Ninth and Tenth Circuits as too loose, stating that "such a rule [would not] make sense" because, as Justice Souter pointed out, "'[I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.'" *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 85 P.3d 67, 88 (Cal. 2004) (citing *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part)). Accordingly, the court below adopted a stricter standard and rejected Catholic Charities' hybrid rights claim because it did not "allege[] a meritorious constitutional claim that might justify the theory's application." *Catholic Charities*, 85 P.3d at 88.

The California Supreme Court invited this Court to clarify what it meant in *Smith*:

> The high court has not . . . determined whether the hybrid rights theory is valid or invoked it to justify applying strict scrutiny to a free exercise claim.

Id. It suggested that the theory may be "dictum" or a "misreading of *Smith*." *Id.* *Amicus* respectfully suggests that the Court take this opportunity—in a case that clearly involves Free Speech and Establishment Clause issues and thus implicates the hybrid rights doctrine—to provide much-needed guidance in First Amendment jurisprudence.

In sum, the federal Courts of Appeals and state Supreme Courts are at a loss to define "hybrid rights" in a principled manner that is consistent with this Court's decision in *Employment Division* v. *Smith,* 494 U.S. 872 (1990). As a result, the term "hybrid rights" has become an exceptionally muddled concept in an area of constitutional jurisprudence that is already well known for its complexity and lack of clarity. Therefore, the Court should grant the writ in this case, which exemplifies that confusion and raises this issue squarely for decision.

CONCLUSION

For all of the foregoing reasons, the writ should be granted.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS AND ETHICS & RELIGIOUS LIBERTY COMMISSION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a state law a "neutral law of general applicability" within the meaning of *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990), where the law employs religious criteria unrelated to the interests furthered by the law to classify religious institutions?

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 120 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

Through a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations. The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The **National Association of Evangelicals** (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of the brief, with the exception of the Alliance Defense Fund, a non-profit religious liberties organization. *See* S. CT. RULE 37.6.

different denominations and serves a constituency of over 20 million people. Religious freedom is a gift of God and vital to the limited government which is our American constitutional republic.

The **Ethics & Religious Liberty Commission** is the ethics, moral concerns, and religious liberty agency for the Southern Baptist Convention, the Nation's largest non-Catholic denomination, with sixteen million members in over 42,000 autonomous local churches. The Commission is charged with addressing public policies affecting religious liberty domestically and abroad. We are concerned with government attempts to define the mission and ministry of the church, believing this to be outside the purview of government and a direct violation of the First Amendment of the Constitution.

SUMMARY OF ARGUMENT

Petitioner's case warrants review by writ of certiorari because the Supreme Court of California radically departed from this Court's guiding case law delineating the standard of constitutional review of a law of that State that trenches upon a fundamental constitutional right, that of free exercise of religion. Because the Women's Contraception Equity Act's religious employer exemption distinguishes among religious institutions based on religious criteria, it is neither facially nor substantively neutral with respect to religion. In addition, the Act is under-inclusive with respect to the interests it is intended to further. As a result, the religious employer exemption is subject to strict scrutiny review. Since the immediate objectives of the Act are not compelling interests, and the religious employer exemption criteria are not narrowly

tailored to any broadly stated interests furthered by the Act, the religious employer exemption fails strict scrutiny.

Review is also warranted because the religious employer exemption criteria also violate the Church Autonomy doctrine embedded in the First Amendment. By requiring state officials to interpret religious doctrine, these criteria involve state officials in activities outside their competence, and result in government entanglement with religion in a way that leads to government favoritism and influence.

ARGUMENT

I. CERTIORARI IS WARRANTED TO ADDRESS THE IMPORTANT FEDERAL QUESTION WHETHER A STATE LAW IS A "NEUTRAL LAW OF GENERAL APPLICABILITY" WITHIN THE MEANING OF *OREGON EMPLOYMENT DIV. V. SMITH*, 494 U.S. 872 (1990), WHERE THE LAW EMPLOYS RELIGIOUS CRITERIA UNRELATED TO THE INTERESTS FURTHERED BY THE LAW TO FAVOR CERTAIN RELIGIOUS GROUPS.

Amici adopt Petitioner's Statement of the Case set forth in its Petition. *Amici* particularly note that the Women's Contraception Equity Act requires group and individual health insurance policies and disability insurance policies that include prescription drug benefits to also include coverage for prescription contraceptive methods. Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1) (the "Act"). The Act exempts "religious employers," but only if contraception "is contrary to [their] religious tenets." Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1).

Further, the statutory phrase "religious employers" does not encompass all religious institutions. Instead, the phrase applies only to those institutions that satisfy the following four criteria: (A) The inculcation of religious values is the purpose of the entity; (B) The entity primarily employs persons who share the religious tenets of the entity; (C) The entity serves primarily persons who share the religious tenets of the entity; and (D) The entity is a nonprofit organization pursuant to Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code of 1986, as amended (which exempt from certain tax filings churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order). Cal. Health & Safety Code § 1367.25(b)(1); Cal. Ins. Code § 10123.196(d)(1). Because Catholic Charities does not satisfy these criteria, the Act "present[s] Catholic Charities with the dilemma of either refusing to provide health insurance coverage for its employees or facilitating the sin of contraception, both of which violate its religious beliefs." *Catholic Charities v. Superior Court*, 109 Cal. Rptr. 2d 176, 182, 187 (Cal. Ct. App. 2001).

In evaluating claims under the federal Free Exercise Clause, the United States Supreme Court has adopted the rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Division, Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990)). However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi* at 531-32. Because the

Act is not neutral and generally applicable, the burden it imposes on the religious practice of Catholic Charities should have been evaluated under strict scrutiny.

The Court has not fully delineated the contours of the neutrality and general applicability requirements, although it has noted that "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. As discussed below, the general applicability requirement evaluates the extent to which burdens imposed by a law apply broadly to all persons or conduct implicating the interests the law seeks to advance. By contrast, the neutrality requirement focuses more narrowly on the specific treatment of religious considerations by a particular law.

A. The California Statute at Issue is Not Neutral as to Religion Where it Employs Criteria Unrelated to the Interests Furthered by the Law to Favor Certain Religious Groups.

California's Act is not neutral with respect to religion because it uses religious criteria to determine whether or not a religious institution is exempt. The Court in *Lukumi* stated that "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* With respect to the Act's religious employer exemption criteria, there is clearly no secular meaning for "inculcating religious values," sharing of "religious tenets," or organizing as a church. As a result, the Act does not even satisfy the minimum requirement of facial neutrality.

Second, the religious criteria set forth in the Act are unrelated to the interests furthered by the Act. In other words, the religious criteria serve not to protect or promote the interests of the Act, but rather merely to distinguish between favored and unfavored religious institutions. In *Lukumi*, the Court evaluated several city ordinances that banned the ritual sacrifice of animals; these laws directly burdened the religious practice of local members of the Santeria religion, who challenged the laws in court. 508 U.S. at 525-28. The Court held that the ordinances were not neutral in part because they were drafted to suppress religious conduct without reference to the legitimate ends asserted in their defense. *See id.* at 535-40. The Court acknowledged that the ordinances address concerns "unrelated to religious animosity" such as public health and prevention of cruelty to animals. *Id.* at 535. However, in reading the ordinances together, the Court concluded that they "disclose an object remote from these legitimate concerns." *Id.* Specifically, "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The same "remote object" appears with respect to the Act's religious employer exemption criteria: the criteria merely serve to distinguish between favored and disfavored religious groups.

Further, even assuming the state has a religiously neutral interest in protecting employees of religious institutions from the religious values of their employers (which it does not), such justification does not explain any of the criteria in the exemption except the employment condition. There is no reason related to this justification, or to the other purposes of the Act, to make exemptions turn on whether religious institutions have the purpose of inculcating religious values, or serve only persons who share their religious

tenets, or qualify under Section 6033(a)(2)(i) or (iii) of the Internal Revenue Code. As the Court in *Lukumi* stated, "a law which visits gratuitous restrictions on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538.

In *Larson v. Valente*, the Court stated that "the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief." 456 U.S. 228, 246 (1982) (quotation omitted).[2] The state law at issue in *Larson* required charitable and religious organizations soliciting contributions to register with the state and submit periodic reports on its solicitation activities. The law contained an exemption, however, for religious organizations that received more than half of their total contributions from members or affiliated organizations. *Id.* at 231-32. In striking down the exemption, the Court held that even though the distinction between covered and exempt religious organizations was formally neutral in that it did not turn on religious criteria, the exemption was not actually neutral with respect to religion. Rather, the Court determined that the criteria "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members. . . ." *Id.* at 245 n.23 (internal citation

[2] Although *Larson* was decided under the Establishment Clause, the Court expressly noted that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." 456 U.S. at 245.

and quotation omitted). As a result, the statute was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations," but rather made "explicit and deliberate distinctions between different religious organizations." *Id.*

The treatment of religious organizations under the Act is of the same fundamental character as the treatment arising under the challenged statute in *Larson*. The exemption criteria in the Act make "explicit and deliberate distinctions" that "effectively distinguish" between religious institutions with different beliefs regarding social service. Specifically, the Act exempts institutions that hold as a matter of doctrine that it is necessary to employ and serve only those who share their religious "tenets," but it does not exempt institutions that hold as a matter of doctrine that when providing social services it is appropriate to employ and serve all people without regard to their faith. Likewise, it distinguishes religious institutions that believe that service is part of the process of inculcating religious values from institutions that believe that service can be provided apart from inculcation of values.

The Court of Appeals for the District of Columbia recently examined a classification similar to the exemption criteria in the Act. In *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the court struck down the "substantial religious character" test used by the NLRB to determine whether it may exercise jurisdiction over a religious employer. This test involved, among other things, an examination of the religious beliefs of the student body and faculty and a determination of the extent to which other views are tolerated on campus. *Id.* In support of its conclusion, the court noted that the test "may minimize the legitimacy of the beliefs expressed by the religious entity." *Id.* at 1345. The court correctly observed that if an

entity "is ecumenical and open-minded, that does not make it any less religious." *Id.* at 1346. Therefore, "[t]o limit the . . . exemption to religious institutions with hard-nosed proselytizing [and] that [serve only] members of their religion . . . is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others." *Id.* (citing *Larson*, 456 U.S. at 244).

This distinction among types of religious institutions undermines the State's argument that the exemption in the Act is neutral and generally applicable because it does not discriminate among religions, but applies to all faiths in the same manner, exempting some but not all parts of all religious organizations. This position is factually wrong. The exemption does not exempt any part of those religious organizations that do not oppose contraception on religious grounds. Likewise, it does not exempt any part of those religious organizations that employ or serve in significant numbers persons who do not share their religious tenets.

Finally, *amici* note that the Act creates an impermissible governmental incentive for religious institutions to adjust their theology and form of ministry. *See Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 343-44 (1980) (Brennan, J., concurring). For instance, religious institutions have an incentive to emphasize to a greater degree the extent to which inculcation is an ultimate purpose that underlies all of its service activities. Likewise, the Act creates an incentive for religious institutions to employ and serve only those persons who share their religious tenets. These incentives work deterrence on religious doctrine that emphasizes service apart from evangelism and that downplays the importance of association with co-religionists in the provision of services.

In applying the neutrality requirement, the Court has stated that it must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted). In the instant case, the survey is not difficult. With respect to its express terms, its purpose, its disparate impact and its incentives, the religious employer exemption in the Act fails to comply with the neutrality principles worked out in *Lukumi* and *Larson*. Therefore, the California Supreme Court should have required the exemption to pass muster under the strict scrutiny standard.

B. The California Statute at Issue is Not Generally Applicable Because it Contains Exemptions Harmful to its Immediate Objectives.

In assessing the general applicability of a law, this Court has stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Because the city ordinances at issue in *Lukumi* were "underinclusive" with respect to the city's interests in preventing cruelty to animals and protecting public health, the Court determined that the city's laws were not generally applicable. The Court noted that the ordinances "fail to prohibit nonreligious conduct that endangers those interests in a similar or greater degree than Santeria does." *Lukumi*, 508 U.S. at 543. Further, the Court noted that "we need not define with precision the standard used to evaluate whether a prohibition is of general application, *for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.*" *Id.* (emphasis added). *See also Fraternal Order of Police, Newark*

Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for certain students).

In *Fraternal Order of Police*, the Court of Appeals for the Third Circuit distinguished between (1) exemptions from a general law for activity that does *not* implicate the interests protected by the law and (2) exemptions for activity that *does* directly impact those interests. The court noted that insofar as the medical exemption from the "no-beards" policy for uniformed officers at issue in that case directly undermined the police department's interest in uniformity, the policy triggered strict scrutiny. *Id.*

The "religious employers" exemption in the Act is comparable to the medical exemption to the "no-beards" policy in *Fraternal Order of Police*. By allowing certain employers to offer prescription drug benefits that do not include contraceptives, the "religious employers" exemption directly implicates the state's interests under the Act. Since the exemption is not limited to employers who only employ persons having a religious objection to the use of contraceptives, there is no assurance that the exemption will not affect female employees wishing to use prescription contraceptives. Because the Act grants such exemptions to some employers but not others, the protections of the general applicability standard are not present.

Further, this effective exemption of certain employers indicates that the state has determined that the economic cost of requiring such employers to provide prescription

contraceptives for their female employees (and the political cost of imposing such a requirement) is greater than the social cost of requiring religious employers to provide such coverage in violation of their religious conscience. This political preference for the economic interests of the implicitly exempt employers over the religious interests of religious institutions covered by the Act represents another sense in which the Act is not neutral with respect to religion. The government is not acting neutrally with respect to religion when it places a higher value on economic interests than religious interests. *See generally Lukumi*, 508 U.S. at 532-542; *Horen v. Commonwealth*, 479 S.E.2d 553, 556-57 (Va. App. 1997) (holding that state law banning possession of owl feathers is not neutral because it includes secular use exemptions, *e.g.*, for museums, but does not exempt religious uses).

II. CERTIORARI IS WARRANTED TO ADDRESS THE IMPORTANT FEDERAL QUESTION WHETHER THE "CHURCH AUTONOMY DOCTRINE" ARTICULATED IN *WATSON V. JONES*, 80 U.S. (13 WALL.) 679 (1871), *KEDROFF V. RUSSIAN ORTHODOX*, 344 U.S. 94 (1952), AND OTHER CASES PERMITS STATES TO ADVANCE STATE INTERESTS BY EMPLOYING RELIGIOUS CRITERIA TO CLASSIFY RELIGIOUS INSTITUTIONS.

A. The Church Autonomy Doctrine Prohibits The Government From Using Religious Criteria To Classify Religious Institutions.

The religious employer exemption in the Act requires state officials – particularly the courts – to interpret religious doctrine, to discern the religious significance of

the activities and values of religious institutions, and, ultimately, to distinguish among religious institutions based on an assessment of the religious nature of their activities. In addition to violating the Free Exercise clause, these requirements also violate the Church Autonomy doctrine since they interfere with the self-identity of religious institutions, involve government officials in activities outside of their competence, and entangle government officials with religion in a way that results in government favoritism and influence.[3]

The rationale underlying Church Autonomy law was expressed by Thomas Jefferson:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline,

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[3] Professor Douglas Laycock is the first to have named the principle invoked here as the Doctrine of "Church Autonomy." The United States Supreme Court has subsequently adopted the term. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341-46 (1987) (Brennan and Marshall, JJ., concurring). Professor Laycock identifies the Church Autonomy principle as a Free Exercise value. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981). The courts have recognized the principle sometimes as a Free Exercise value, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 107 (1952), sometimes as a non-establishment value, *Meek v. Pittenger*, 421 U.S. 349 (1975), Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 Iowa L. Rev. 1 (1998), and sometimes as a value which springs both from the Free Exercise Clause and from the anti-entanglement notions of the Establishment Clause. *Presbyterian Church of the United States v. Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). The Court generally has taken the latter approach by identifying the value as a general "First Amendment" value without specifying whether it springs from the Free Exercise Clause, the Establishment Clause, or both.

> and exercise. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. . . . Every religious society has a right to determine for itself the times for [its religious] exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it.

Thomas Jefferson Letter to Rev. Samuel Miller (1808) from *Thomas Jefferson: Writings*, 1186-87 (Merrill D. Peterson ed. 1984).

The doctrine of Church Autonomy is at the very heart of the Religion Clauses because it – unlike the Free Exercise Clause's compelling governmental interest and least restrictive means analyses and unlike the Establishment Clause's secular purpose and primary effect analyses – involves no weighing of competing interests between church and state. Application of the doctrine of Church Autonomy simply inquires whether the law at issue requires an interpretation of or interference with religious doctrine, polity, discipline, canon law, or ecclesiastical relationships.

The line of cases articulating the Church Autonomy principle begins with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *Watson* involved a property dispute between the pro-slavery and anti-slavery factions of a divided Presbyterian congregation in postbellum Kentucky. The *Watson* Court held that disputes in hierarchical churches should be decided by a rule of judicial deference to the ecclesiastical hierarchy. The Court first reasoned that this rule is required by the right of religious institutions to determine their own religious identity:

> The law knows no heresy and is committed to the support of no dogma, the establishment of no

> sect. The right to organize voluntary religious associations to assist in expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association is unquestioned. . . .

Id. at 728-29. The court explained that the rule also recognizes the limits of judicial competence. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to the one which is less so." *Id.* at 729.

Finally, the court recognized that should it and other civil courts assert jurisdiction over internal church affairs, the civil litigation would inevitably result in wholesale entanglement of government in religious affairs:

> [I]t is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, and would open the way to all the evils which we have depicted. . . .

Id. at 733-34.

In *Kedroff*, the Court affirmed the principles articulated in *Watson*, stating

> [*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

344 U.S. at 116.

Watson's wake is wide and deep, with published precedents approvingly invoking its authority over 920 times. Its holding and rationale, as the Supreme Court itself predicted, have had "far-reaching consequences," *id.*, and have caused courts to decline jurisdiction in at least six types of cases, including intra-church property disputes;[4] certain disputes arising from church-related trusts;[5] church-minister disputes;[6] clergy malpractice claims;[7] parishioner discipline controversies;[8] and church speech claims.[9] In these

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[4] *E.g., Kedroff*, 344 U.S. 94 (1952) and *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979).

[5] *E.g., Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *see Krauthoff v. Attorney General*, 240 Mass. 88, 132 N.E. 865 (1921).

[6] *E.g., McClure v. The Salvation Army*, 460 F.2d 553 (5th Cir. 1972) and *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989).

[7] *E.g., Nally v. Grace Community Church of the Valley*, 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988); *Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250 (D. Colo. 1998).

[8] *E.g., O'Connor v. Diocese of Honolulu*, 889 P.2d 261 (Hawaii 1994) and *Parish of the Advent v. Episcopal Diocese of Massachusetts*, 426 Mass. 268, 688 N.E.2d 923 (1997).

[9] *E.g., United States v. Ballard*, 322 U.S. 78 (1944); *Klagsbrun v. Va'Ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D.N.J. 1999), and *Parish of the Advent*, 426 Mass. 268, 688 N.E.2d 923 (1997).

cases and others, the Court has consistently refused to permit government officials to use religious criteria to classify or distinguish among religious institutions. With respect to the rationale underlying *Watson*, such classifications invade upon the right of religious institutions to define and interpret their own doctrine, including the religious significance of their activities. In addition, government officials are not competent to interpret and apply such classifications. Finally, such classifications result in excessive entanglement between government officials and religious institutions, creating a substantial risk of undue influence or government favoritism. This risk is heightened by the fact that to apply such classifications, the state must (implicitly at least) adopt and promote a particular orthodoxy.[10]

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[10] *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (overturning a conviction for holding "religious meetings" in a public park because the distinction between "worship" and an "address" on religion was inherently a religious question and invited discrimination); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981) (distinction between "religious worship" and other forms of religious expression rejected on the basis that it "[lacked] intelligible content," that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer," and that, in any event, the proposed distinction was constitutionally irrelevant); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs).

B. The Exemption Criteria in the Act Impermissibly Use Religious Criteria to Classify Religious Institutions.

The first prong of the exemption contained in the Act requires state officials to determine what values of a religious institution are "religious values" and whether the purpose of the institution is to inculcate such values. Put differently, in order to ensure that a religious institution does not have the purpose of "inculcating religious values," a government administrator must discern the religious significance (or lack thereof) of the values and activities of a religious institution. For instance, if an institution promotes honesty, or respect for parents, or care for the needy, state officials must determine if any of these values are religious. Clearly, some religious institutions would identify these as religious values, whereas others may not. But the important point is that state officials cannot make this inquiry without offending the Church Autonomy doctrine.

On the one hand, state officials may attempt to discern the religious nature of an institution's values by interpreting its religious doctrine, a task which is clearly outside of their competence. State officials are no more competent to identify and interpret a value as a "religious value" than were the officials in *Fowler* competent to discern between whether a particular event constituted "worship" or a "religious address." Alternatively, state officials may compare the institution's values with values they implicitly consider to be "religious values." However, this approach also fails since it creates an implicit state defined orthodoxy regarding religious values and interferes with the right of religious institutions to determine and apply their own doctrine. In short, as with the rejected

test in *Fowler*, *Widmar*, and *Great Falls*, the "religious values" test entangles the government in theological classification, and invites covert religious favoritism.

Similar problems also arise with respect to discerning whether the purpose of an activity is to "inculcate" or merely "express" religious values. Such discernment requires precisely the inquiry into the religious significance of words and practices rejected in *Widmar*. For instance, suppose a religious institution expresses its religious value of caring for the needy solely by providing meals and shelter. Further, suppose the religious institution believes as a matter of doctrine that it is to "teach by example" rather than by preaching. In this case, the religious institution has two purposes related to its religious values for its activities: to serve and to teach. However, because state officials are not competent to interpret the institution's doctrine, they cannot conclude based on this doctrine that the purpose of the institution is to inculcate its religious values. So instead, they may conclude based on their own conceptions of orthodoxy that the purpose of the institution is not to inculcate religious values. But this conclusion favors one religious doctrine of inculcation over another.[11] Indeed, a more discriminatory

[11] There is no way to avoid the fact that theologically "liberal" activities will often appear to minor local officials as "secular" whereas theologically "conservative" or orthodox activities will more likely be regarded as "inculcating religious values." It is increasingly recognized that, when it comes to religion and public life, the significant distinctions no longer track the denominational lines separating Protestants, Catholics, Jews, and Muslims. Instead, religious believers are more meaningfully categorized as traditional or "orthodox" and theologically liberal or "progressive" (whether Protestant, Catholic, Jewish, or Muslim). *See* James Davison Hunter, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42-46 (1991). Professor Hunter explains that orthodox

(Continued on following page)

rule than one that privileges some theological traditions over others could hardly be devised.

The second and third prongs of the religious employer exemption also raise insurmountable issues of lack of competence and interference. These prongs require state officials to determine whether employees and service recipients share the religious tenets of a religious institution. As such, they require the state to inquire into the beliefs and tenets of both the employees and the service recipients of a religious institution, and to compare these beliefs and tenets with those of the religious institution. This is precisely the type of "intermeddling" the Founders proscribed (and that most recently has been rejected in *Great Falls*). Further, this is essentially the same comparison of doctrine the Court refused to conduct in *Watson*. Finally, as discussed above, this is a task for which state officials (and the courts) are manifestly not competent.

The requirement that contraception be "contrary to [the] religious tenets" of a religious institution creates an additional level of inquiry into religious doctrine. This is because a religious institution may be opposed to some forms of contraception (*e.g.*, abortifacients), but not others. Hence, state officials may need to determine whether each

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believers are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." The latter type of religious organizations, those most likely to align with contemporary culture, will, unsurprisingly, appear less "religious" or sectarian to government officials, while those who are more conservative in their theology and who ignore cultural assumptions will appear more sectarian.

federally approved prescription contraceptive violates the religious tenets of a religious institution.

The Court's *Amici* emphasize that the problem here is not that government officials are simply interacting with religious organizations. Some regulatory interaction – indeed, some adjustments and cooperation – between government and religious organizations is inevitable, given that government keeps getting bigger and society more complex. *Amici's* argument here is not that the inevitable and unremarkable regulation that affects the operation of religious organizations necessarily invades the "privacy" of religious groups. Rather, we object to a government effort to exceed its constitutionally limited powers by adjudicating subject matters reserved to the sole cognizance of religion and religious organizations, matters that were, using Professor Rakove's apt term, "deregulated" at the Nation's founding.[12]

CONCLUSION

The Court's *amici* urge that the California Supreme Court has taken a dramatically different and wrong-headed course from that laid out by this Court in the somewhat hazardous waters of First Amendment church-state jurisprudence. The California court's decision consequently warrants review by this Court with an eye toward providing guidance to the several States and the federal

[12] *See* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 311-12 (1997) ("[A]t the heart of [Madison's and Jefferson's] support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, [and] placed beyond the cognizance of the state[.]").

system over the meaning and parameters of the Court's decision in *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990).

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IN THE

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CATHOLIC CHARITIES OF SACRAMENTO, INC.,
Petitioner,

v.

CALIFORNIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of California

BRIEF OF *AMICI CURIAE* THE FAMILY RESEARCH COUNCIL AND THE ALIANCE DEFENSE FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI IN THIS CASE[1]

FAMILY RESEARCH COUNCIL ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to reaffirm and promote the traditional family and the Judeo-Christian principles upon which it is built. FRC provides resources and guidance for families and promotes activities which are designed to strengthen traditional marriage.

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. Its membership includes hundreds of lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including cases before the U.S. Supreme Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

California's Women's Contraception Equity Act ("WCEA") exempts some, but not all, religious organizations from having to provide contraception coverage to women, even though the law's purpose is to provide contraception coverage to women

This Court has held that a law that offers an exemption undermining its purpose is not generally applicable. A law that is not both neutral and generally applicable must meet strict scrutiny when applied to a Free Exercise Claim. However, there is a split among the circuits about what constitutes a generally applicable law. The California Supreme Court's decision below is in conflict with the view of the Third and Sixth Circuits on general applicability. It held that the WCEA is generally applicable even though it grants an exception undermining its purpose. The court subjected the law solely to rational basis review. This Court should grant the Petition for Certiorari to resolve the conflict between the California Supreme Court and the Third and Sixth Circuits, and affirm that a law granting an exemption undermining its purpose must meet strict scrutiny.

Moreover, a law that favors select religious organizations over others is not neutral. The WCEA favors religious organizations that only inculcate values and minister to their own members. It disfavors religious organizations that focus their efforts outside the church by doing things like feeding the hungry, caring for the sick, and providing shelter to the homeless. This Court should also grant the Petition to affirm that a law that prefers one religious organization over another is not neutral and must meet strict scrutiny when applied to a Free Exercise claim.

REASONS FOR GRANTING THE WRIT

BACKGROUND

California's Women's Contraception Equity Act ("WCEA") requires employers who provide prescription drug coverage to also provide contraception coverage. The WCEA exempts some, but not all, religious organizations.[2] One of the religious organizations not exempted is Catholic Charities.

A central mission of the Catholic Church is to evangelize those inside and outside its walls. For centuries the Church has carried out this mission in a variety of ways, the most distinctive of which is through its many works of charity.[3] Catholic Charities is the organ of the Church charged with carrying out this mission. The Church cannot

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[2]The relevant text of WCEA's exemption is:

> A) The inculcation of religious values is the purpose of the entity;
>
> B) The entity primarily employs persons who share the religious tenets of the entity;
>
> C) The entity serves primarily persons who share the religious tenets of the entity;
>
> D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended.

Cal. Health & Saf. Code, § 1367.25 (b)(1).

[3] Catechism of the Catholic Church ("CCC") § 2447 citing Matthew 25:31-46. These works include "feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick and imprisoned, and burying the dead." *Id.*

and will not cease to perform these works of mercy.[4] But in California, this mission makes it impossible for Catholic Charities to provide its workers prescription drug coverage. Thus, the WCEA puts the Diocese of Sacramento at a heavy disadvantage in attracting quality employees.[5]

Catholic Charities is not the only group whose religious beliefs are burdened by the WCEA. The Sisters of Charity, for example, presumably do not merit exemption because their purpose is to evangelize the poor by engaging in works of mercy. A Protestant church or organization that is compelled by its religious beliefs to operate a rescue mission, a food kitchen, or a pregnancy center would also fail to qualify for the state's exemption.[6] And the Salvation Army would almost certainly not qualify because its mission is to evangelize by working for the "social betterment of the poor."[7] Indeed, when asked about the Salvation Army being forced to provide domestic partners benefits for its employees in New York, Salvation Army spokesman George Hood responded, "We've got bigger problems in California."[8] He was referring to the Catholic Charities case.

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[4] CCC § 2448 (citation omitted). The Church's works of charity "remain indispensable always and everywhere." *Id.*

[5] Because it is not an option for the Bishop of Sacramento to provide prescription contraceptive coverage, Catholic Charities cannot offer prescription coverage. Thus, they are placed at a significant competitive disadvantage.

[6] It is not only the Catholic Church that objects to the use of contraception. *See, e.g.*, Sam Torode & Bethany Torode, *Open Embrace: A Protestant Couple Rethinks Contraception* (2002).

[7] Salvation Army International Heritage Center, *Who We Are and How We Work*, 2003, *available at* www1.salvationarmy.org/heritage.nsf/36c107e27b0ba.

[8] Mark A. Kellner, *Army Facing Battle on Benefits*, Christianity Today (July 12, 2004) available at www.christianitytoday.com/ct/2004/128/22.0.html.

The bottom line is that the WCEA, and its unconstitutional category of exemptions, places an unreasonable burden on religious organizations providing much needed services that lighten the load on government agencies.

A law that is not both neutral and generally applicable must meet strict scrutiny when applied to a Free Exercise claim. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). This Court has not fully explained the contours of this test, and there appears to be confusion among lower courts on how to decide whether a law is generally applicable. This confusion arises because of the holding in *Employment Division v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (internal citation omitted). Some courts have taken this language, combined with the Court's mention of "individualized governmental assessment," to mean that strict scrutiny *only* applies when there is a system of ad hoc and individualized assessment.

In the decision at issue, the California Supreme Court held that although the WCEA exempts some, but not all, religious organizations, it was nonetheless neutral and generally applicable. *See Catholic Charities of Sacramento v. Superior Court*, 32 Cal. 4th 527, 537 (2004) (noting that the purpose of the law was to "eliminate gender discrimination in health care benefits and to improve access to prescription contraceptives"). The court's ruling on general applicability, however, is in conflict with decisions of the Third and Sixth Circuits.

Moreover, a law that prefers certain denominations or religious organizations over others is not neutral. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another").[9] California's WCEA favors religious organizations that are inwardly focused, and discriminates against those that meet the needs of non-members. Nevertheless, the California Supreme Court held that the WCEA was neutral and generally applicable, and that the law need only meet rational basis review.

This Court should grant the Petition for Certiorari to resolve the conflict about how to determine whether laws are generally applicable and to correct the California Supreme Court's error in holding that a law favoring select religious organizations is neutral.

I. THE STANDARD FOR DETERMINING WHETHER A LAW IS GENERALLY APPLICABLE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT.

A. This Court Has Ruled That A Law That Grants An Exemption That Undermines Its Purpose Is Not Generally Applicable.

Lukumi held that a law granting an exemption that undermines the law's purpose is underinclusive and not generally applicable. *Lukumi*, 508 U.S. at 543. Underinclusive laws "fail to prohibit non-religious conduct

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[9] In *Larson*, this Court used the terms "denomination" and "religious organization" interchangeably. *See, e.g., id.* at 253 (noting that the Act applies to "some religious organizations but not others").

that endangers [the law's] interest in a similar or greater degree" as the non-exempt conduct. *Id.*[10] Such a law should be suspect because it values certain classes of conduct over others when both exemptions have a similar impact on the law's effectiveness. "All laws are selective to some extent, but *categories of selection* are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542 (emphasis added). "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546.

This Court also requires that a law must be *both* neutral *and* generally applicable. "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. While the two requirements are "interrelated," they may not be conflated. This Court analyzed the law at issue in *Lukumi* to determine both its neutrality and its general applicability. *Id.* at 533-42 (determining the law's neutrality) and at 542-46 (determining the law's general applicability).

B. There Is A Conflict Among The Circuits On How To Determine Whether A Law Is Generally Applicable.

There is much confusion among the circuits on how to properly decide Free Exercise cases. Two circuits—the Third and Sixth—have held that categorical exemptions that undermine the purpose of the law are subject to strict or heightened scrutiny. Two other circuits—the Ninth and Tenth—apply strict scrutiny only where there is a system of

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[10] *See generally* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850 (2001).

individualized, ad hoc exemptions that evidence hostility toward religion. The latter cases have capitalized on select language in *Smith*, without also looking to *Lukumi's* refinement of Free Exercise analysis.

1. The Third and Sixth Circuits hold that a law is not generally applicable if it makes a categorical exemption that undermines its purpose.

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit found that a police policy that granted exemptions undermining the purpose of the law was subject to strict scrutiny. 170 F.3d 359 (3d Cir. 1999). The policy prohibited officers from wearing beards, but offered exemptions to two categories: 1) officers that had medical reasons for wearing a beard; and 2) officers that were under-cover. *Id.* at 360. Two Muslim officers requested an exemption from the policy for religious reasons, but were denied. The court found that the City's reason for the policy was to promote uniform appearance among its officers, and that the exemption for medical reasons undermined that policy—it made the police officers' appearance non-uniform. *Id.* at 366. Thus, the policy as it was applied to the Muslim officers was subject to heightened scrutiny under the Free Exercise Clause. *Id.*[11]

The court found that the exemption for under-cover officers, however, would not subject the law to heightened scrutiny because the under-cover officers never dressed in uniform anyway, so their exemption did not undermine the

[11] The court applied only heightened scrutiny "since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny." *Fraternal Order of Police*, 170 F.3d at n.7.

policy's purpose. *Id.* at 365-66. The Third Circuit affirmed this holding in *Tenafly Eruv Association v. Borough of Tenafly*, acknowledging that its decisions are in disagreement with two of its sister circuits. 309 F.3d 144, 165-66 (3d Cir. 2002). "We note that, in contrast to our decision in *Fraternal Order of Police*, two other circuit courts have stated that the Free Exercise Clause offers no protection when a statute or policy contains broad, objectively defined exceptions not entailing subjective, individualized consideration." *Id.* at 167 n. 27 (citing *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998) and *Am. Friends Serv. Comm. v. Thornburgh*, 951 F.2d 957, 961 (9th Cir. 1991)).

Earlier, in *Kissinger v. Board of Trustees*, the Sixth Circuit found that a University policy was generally applicable because it did not grant *any* exceptions. 5 F.3d 177, 179 (6th Cir. 1993). In that case, a student asked to be exempt from a course in which "healthy animals are anesthetized, operated upon, and then killed. *Id.* at 178. The student asked to enroll in an alternative course because killing healthy animals violated her religious beliefs. *Id.*

The court found that because the law did not offer any exceptions, it was "generally applicable to all students," and therefore satisfied *Smith's* requirement. *Id.* at 179.

2. The Ninth And Tenth Circuits Hold That A Law Is Generally Applicable Unless There Is An Individualized System Of Ad Hoc Exemptions.

In *Axson-Flynn v. Johnson*, the Tenth Circuit held that even though a University policy allowed categorical exemptions, the proper question was whether there "was a

pattern of ad hoc discretionary decisions amounting to a 'system.'" 356 F.3d 1277, 1299 (10th Cir. 2004). In that case, a university student requested an exemption from having to say certain obscenities in an acting class. The school denied that request, but granted an exemption to a student who wanted to be exempt from acting requirements on Yom Kippur. *Id.* at 1298. Although the exemption undermined the purpose of the policy, the court would only apply strict scrutiny if there were a system of individualized, ad hoc exemptions. *Id.* at 1299.[12] But the court acknowledged that "courts and commentators are divided on the question" of how to apply the test in *Smith*. *Id.* at 1297.

In *American Friends Service Committee Corporation v. Thornburgh*, the Ninth Circuit analyzed a law that required employers to verify the immigration status of its employees. 961 F.2d 1405 (9th Cir. 1992). A Quaker company had been denied an exemption and sued on Free Exercise grounds. The court found the law generally applicable because the state did not have a system of "individualized exemptions," even though it made exemptions for independent contractors and household employees. *Id.* at 1408-09.

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[12] *See also Swanson v. Guthrie*, 135 F.3d 694, 701 (10th Cir. 1998) (looking only for a "system of individualized exceptions that give rise to the application of a subjective test" despite evidence of categorical exemptions).

II. THE DECISION OF THE CALIFORNIA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THE THIRD AND SIXTH CIRCUITS.

A. The California Supreme Court Held That A Law With An Exception Undermining Its Purpose Was Generally Applicable.

The decision of the California Supreme Court conflicts with the decisions of the Third and Sixth Circuits on how to apply the *Smith* and *Lukumi* test. The Third and Sixth Circuits hold that a law offering categorical exemptions undermining its purpose is not generally applicable. The California Supreme Court, however, conflated neutrality and general applicability, and held that although the WCEA offers categorical exemptions undermining its purpose, it is nonetheless generally applicable.

The California Supreme Court assumed that because neutrality and general applicability were "interrelated," they could be analyzed under the same standard. *Catholic Charities*, 32 Cal. 4th at 550-51. Thus, the California Supreme Court did not separately analyze whether the WCEA is generally applicable. The court instead simply looked to see if the law was facially neutral or "gerrymandered the law to reach only Catholic employers." *Id.* at 550.

The court's analysis differs markedly from that of the Third and Sixth Circuits because it did not seem concerned with whether there was an exception, and whether that exception undermined the purpose of the law.[13] But the

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[13] Instead of addressing the burden on Catholic Charities, in comparison to the exception, the court undertook an unrelated discussion of whether

WCEA's exception does undermine the purpose of the law—to provide prescription contraception to women—by exempting certain religious organizations from having to provide prescription contraception coverage for female employees. *Id.* at 565 (recognizing that the exemption "increases the number of women affected by discrimination in the provision of health care benefits"). The exemption facially and as applied discriminates among religious organizations based on their practices. Thus, the California decision is in conflict with the decisions of the Third and Sixth Circuits on whether such a law is generally applicable.

B. *Smith* Does Not Support the California Supreme Court's Decision.

The California Supreme Court used this Court's decision in *Smith* to support its opinion. *See, e.g., Catholic Charities*, 32 Cal. 4th at 541. But because the law at issue in *Smith* did not have an exception that undermined its purpose, it was generally applicable.

A law that makes exemptions may or may not be generally applicable, depending on the nature of the exemptions and the purpose of the law. For example, in *Smith* the purpose of the law was to protect the health and safety of the state's citizens, and it granted an exemption to use peyote for medical reasons as prescribed by a doctor. *Smith*, 494 U.S. at 874. The law was still generally applicable even though it failed to exempt religious use because the exemption did not undermine the purpose of the law—the health and safety of the state's residents. In fact, such a law would arguably advance the health and safety of

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the legislature may accommodate religion at all. *Id.* at 551-52. Catholic Charities' point was that if the legislature chooses to accommodate religious practices it may not pick and choose which practices to exempt.

the individual if it was prescribed by a doctor within a controlled environment. Thus, the law in *Smith* was generally applicable.

But if the law in *Smith* had granted an exemption for peyote use to any religious group whose primary purpose was to inculcate religious beliefs and minister to those within its membership, while excluding religious groups providing social services, the law would not have been generally applicable. The exemption would have undermined the purpose of the law by granting an exception that was harmful to the health and safety of those who used the drug. Such an exemption would have been subject to strict scrutiny. That is the kind of exemption California provided to the WCEA. Accordingly, *Smith*'s holding on laws of general applicability does not support the California Supreme Court's decision.

This Court should clarify that neutrality and general applicability are not synonymous, and that laws that grant exceptions undermining the purpose of the law are not generally applicable.

III. THE CALIFORNIA SUPREME COURT'S STANDARD FOR NEUTRALITY CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. A Law That Makes Distinctions Among Religious Organizations Is Not Neutral.

The irreducible minimum of the First Amendment is that the government must be neutral toward religion. *Lukumi*, 508 U.S. at 532. The Free Exercise and Establishment Clauses compliment one another to ensure

that the government does not prefer one religious organization over another. *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause").[14] As this Court stated in *Larson*, "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny adjudging its constitutionality." *Id.* at 246.

In *Larson*, this Court struck down a law very similar to California's WCEA. In that case, the law disfavored religious organizations that solicited more than 50% of their funds from non-members. The law was unconstitutional because it made distinctions *between* religious organizations. *Id.* at 255. This sort of law violates the "clearest command" of the Establishment Clause—one religious organization may not be preferred over another.

A law that prefers certain religious organizations over others, based on whether their activities are public or private, is a prime example of a non-neutral law and must meet strict scrutiny.

B. California's WCEA Is Not Neutral Because It Favors Select Religious Organizations.

The WCEA prefers denominations or religious organizations that only inculcate religious values and minister to those within their own walls. Cal. Health & Saf. Code, § 1367.25 (b)(1)(A & C). It disfavors those groups that focus their efforts outside the church by doing things

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[14] *See also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-273 (1951).

like "feeding the hungry, caring for the sick, and providing shelter to the homeless." *Catholic Charities*, 32 Cal. 4th at 571 (Kennard, J., concurring). The legislature apparently believed that it was entitled to weigh the religious value of ministries, depending upon their activities—the legislature concluded that private religion is more important than public religion. But the California Supreme Court held that the law was nonetheless neutral. *Id.* at 549.

To reach this result, the court looked at the WCEA as an accommodation to religion instead of as a religious preference. The court stated that "[b]ecause a legislative accommodation benefits religion, it is tested not under the free exercise clause but under the establishment clause." *Id.* at 551. The court then analyzed the WCEA's exemption—or "accommodation"—to ensure that it did not violate the Establishment Clause. *Id.* at 551-52.

The court suggested that because the exemption is gratuitous, the WCEA need not be neutral. So because the state is not required to grant an exemption at all, any exemption given is of the state's grace and is only subject to a *Lemon* analysis rather than *Larson* or *Lukumi*. Thus, with a slight twist in perspective, a non-neutral law becomes an accommodation of religion, and the state becomes a benefactor rather than a villain.

Whether California considers its choice an exemption or an accommodation, however, is irrelevant—either way the selection must be neutral. California need not offer any exemption. But when it does offer an exemption, it must be religiously neutral. The state may not choose which groups to exempt based on the external characteristics or types of religious organizations. California's law is inherently non-neutral because it prefers certain religious practices over others.

The court also ruled that "while the WCEA may treat some Catholic employers more favorably than other employers, the WCEA does not under any circumstances treat Catholic employers less favorably than any other employers. About a law such as this, *Larson* has nothing to say." *Catholic Charities*, 32 Cal.4th at 554. Essentially the court held that the state did not engage in religious preference because "the WCEA applies to religious and nonreligious organizations equally." *Id.*

As Justice Kennard's concurrence points out, however, the law at issue in *Larson* is "substantially similar" to California's WCEA—the Minnesota law in *Larson* treated non-religious groups just the same as religious groups not qualifying for the exemption. *Id.* at 570. The relevant question is whether one religious organization or practice is favored or preferred. *Larson*, 456 U.S. at 244. Both the Minnesota law in *Larson* and California's WCEA prefer certain religious organizations over others based on the characteristics and practices of the organization. Justice Kennard rightly concluded that such a law is subject to strict scrutiny.[15]

If a law that carves out exemptions only for select religious groups is neutral, then there is no such thing as a non-neutral law. This Court should correct the California Supreme Court's misinterpretation of *Smith's* neutrality requirement.

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[15] Justice Kennard did not dissent because Catholic Charities did not qualify under the fourth prong of the WCEA's exemption that requires it to be exempt from federal tax filing. *Catholic Charities*, 32 Cal.4th at 569. But to qualify as a religious organization, the fourth prong of the exemption essentially relies upon the same kind of distinction between spiritual and secular, private and public, that Justice Kennard thought required strict scrutiny. .

CONCLUSION

Amici respectfully requests that this Court grant the Writ of Certiorari to affirm that: (1) neutrality and general applicability are analyzed separately under *Smith* and *Lukumi*; (2) a law granting an exemption that undermines its purpose is not generally applicable; and (3) a law that disfavors religious organizations based on their activities is not neutral.

Respectfully submitted,

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